# Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 38 ST. LOUIS, MO., MAY 18, 1894. No. 20

# Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Published by

**Central Law Journal Company,**

919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.

Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.




Entered at the post-office, St. Louis, Mo., as second-class matter.

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The story is told of a negro litigant that after his attorney had concluded his challenges to the jury, he insisted that what he "most wanted" was to "challenge de judge." This pleasing amusement would not be denied him if he was fortunate enough to be a defendant in a Missouri Criminal Court, for, under a section of the criminal code of that State, the defendant may obtain a change of venue by simply filing an affidavit stating "that the justice is prejudiced against him." The popularity of this mode of defeating or at least delaying justice has been demonstrated by the fact that since the passage of the act in 1891, such procedure has been resorted to in most, if not all, the principal cases before the St. Louis Criminal Court. The *Albany Law Journal* has the following very true and appropriate remarks in regard to this abuse: "A law allowing an accused person to swear away his case from the legally elected judge on the ground of prejudice, without calling for any proof of the existence of such prejudice, was passed at the instigation of a member of the legislature of that State who happened at the time to have a client in jail for train robbery and who feared that the local judge was opposed to train robbery. It has since been used to the point of shameful abuse, and in St. Louis, the *Globe Democrat* says, it is now being used to cheat the ends of justice, and at the same time to envelope the career of Judge Edmunds in a cloud of suspicion of unfairness which is quite unjust to that gentleman. Nearly all the important criminal cases are being sworn away from Judge Edmunds on the ground of prejudice, and when investigation is made it appears that the reason for the accusation is the belief—or, rather, the simple assertion—that in the trial of criminal cases, Judge Edmunds is inclined to lean too strongly toward the State's side. It is easy to see how the reputation of an honest and upright judge can be injured by a law like this. A number of lawyers conspire against him, swear their cases away from him, and make the public believe that he is incapable of conducting a trial impartially. When questioned on the subject, these lawyers say that all they want is a fair-minded judge. But the fact is that a fair-minded judge is the very thing they do not want. The law should be repealed, or if not repealed, it should be so amended as to require proof of prejudice in addition to the mere assertion which is now sufficient."



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United States Circuit Judge Taft has recently declared the so-called Nichols tax law of Ohio invalid. This law, which was passed by the legislature of Ohio a short time ago, provided that a State board of appraisers consisting of the State treasurer, State auditor, and attorney general should appraise the Ohio property of telegraph, telephone and express companies for taxation, and that the assessed valuation of the companies should be based not only upon the actual value of the properties owned by them within the State, but also upon the properties located elsewhere, including the capital stock. Several of the more important companies affected brought suit in the United States Circuit Court to restrain the State board of appraisers from certifying to the various county auditors the assessments on their property, under the law, on the ground that it was unconstitutional, and in the decision just rendered by Judge Taft their position is sustained. The law was construed as requiring the board of appraisers to use as a controlling element in estimating the property of express, telegraph and telephone companies in the State of Ohio the market value of the stock, and it appears that after estimating the value of the bonds and capital stock the board proceeded in the assessment upon the theory that the market value of the shares of the capital stock represented a certain amount of taxable property, in that it bore a fixed relation to the tangible property of the corporation. Judge Taft, in his decision, took the ground that the law was unconstitutional, for the reason that the constitution of Ohio provides that laws taxing property shall tax it by a uniform rule, and that the property of individuals and other corporations is taxed according to the intrinsic value of the property itself, whereas the taxation of the tangible property of a corporation with reference to the market value of its

capital stock, aggregated together, add to the value of the tangible property certain elements of good will, of the skill, economy and honesty of the management, and what are called in municipal franchises right to use streets, etc., which are not taxable under the constitution of Ohio. Judge Taft said that the constitution of Ohio and the uniform rule of assessing property required in that State would be violated by placing a fictitious value upon the tangible property within the State; that the tax could not be construed to be a franchise tax, because it professed to be a tax on property, and that to sustain it as such would be to commit to the discretion of the appraisers the amount of the tax, which would be a delegation of legislative authority. The decision is, it will be seen, in effect a construction of the constitution of a State by a Federal Court. This fact was adverted to by the judge, who said that he was very reluctant to pass on the question in advance of the Supreme Court of the State, but as he had already delayed his opinion since December, with the counsel on both sides pressing for a decision, he could not with a due sense of judicial obligation withhold delivering it, though the question was one upon which the Supreme Court of Ohio was an ultimate authority, and one which the Federal Court considered with much hesitation.

## NOTES OF RECENT DECISIONS

CONSTITUTIONAL LAW — POLICE POWER—EMPLOYMENT OF CHILDREN IN THEATERS.—It is held by the New York Court of Appeals in People v. Ewer, that Section 292 of the Penal Code, prohibiting the employment of a female child, apparently or actually under the age of fourteen years, as a dancer, or in a theatrical exhibition, or in any exhibition dangerous or injurious to the life, limb, health or morals of the child, is constitutional; that when the operation of the police power of the State is in the direction of so regulating the use of private property and of so restraining personal action as manifestly to secure, or to tend to the comfort, prosperity or protection of the community, providing that the legislation has some relation to these ends, then no constitutional guaranty is violated and the legislative authority is not transcended. Section 292 of the Penal Code is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb, or what is required of the child actor. Its application is to all public exhibitions or shows. The inalienable right of a child or adult to pursue a trade is indisputable, but it must be not only one which is lawful, but which, as to the child of immature years, the State, as *parens patriæ* recognize as proper and safe. The cases which limit the exercise of the police power establish that the legislature has no right, under the guise of protecting health or morals to enact laws which, bearing but remotely, if at all, upon these matters of public concern, deprive the citizen of the right to pursue a lawful occupation.

CONSPIRACY TO INJURE BUSINESS—REMEDIES—DAMAGES—INJUNCTION.—In Jackson v. Stanfield, 36 N. E. Rep. 345, decided by the Supreme Court of Indiana, it appeared that "The Retail Lumber Dealers' Association of Indiana," by its by-laws gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in such member's community, provided for a hearing of the claim by a committee, and required members to refuse to patronize a wholesaler who ignored the committee's decision. Plaintiff, who was not a "regular dealer," underbid defendant on a contract, but wholesalers refused to sell to him, and he was obliged to abandon the contract, because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. It was held that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff. Upon the law applicable to the case Dailey, J., says:

> A conspiracy formed and intended, directly or indirectly, to prevent the carrying on of any lawful business, or to injure the business of any one, by wrongfully preventing those who would be customers from buying anything from the representatives of such business by threats or intimidation, is in restraint of trade and unlawful. Under a statute of Massachusetts "a combination to restrain trade so as to impoverish a man in his business is indictable." 4 Amer. &

Eng. Enc. Law, p. 608, citing note 3. On the same page it is said: "The labor and skill of the workman, the plant of the manufacturer, and the equipment of the farmer are, in an equal sense, property. Every man has a right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence, or a species of intimidation that works upon the mind. While the law accords this liberty to one, it accords a like liberty to another, and all are bound to use and enjoy their own liberties and privileges with regard to those of their neighbors." In People v. Petheram (Mich.), 31 N. W. Rep. 188, it is said: "No one is authorized to unlawfully destroy or hinder the lawful business of another for the purpose of helping himself." In 1 Hawk. P. C. ch. 72, § 2, it is laid down that, "all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law." The same proposition, in various forms of expression, is declared in a long list of authorities cited in 4 Amer. & Eng. Enc. Law, 609; so that, as the author states it, "we are compelled to forsake the literature of doubt, and to cleave unto that of authority." It is held in State v. Stewart, 59 Vt. 273, 9 Atl. Rep. 559, that "such conspiracies may give the individual directly affected by them a private right of action for damages." In Walker v. Cronin, 107 Mass. 555-564, it is said that "every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of the like rights by others, it is *damnum absque injuria*." In Carew v. Rutherford, 106 Mass. 14, it is said: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. . . . He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without any unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions." And in Com. v. Hunt, 4 Metc. (Mass.) 134, Shaw, C. J., declares that the legality of such association will depend upon the means to be used for the accomplishment of its objects, and whether they be innocent or otherwise. In More v. Bennett, 140 Ill. 69, 29 N. E. Rep. 888, the court held that a combination or conspiracy entered into by a stenographic association, by which the prices of reporting legal proceedings by shorthand are to be kept up by the prevention of competition, although such association may embrace but a comparatively small part of the reporters engaged in the business, but which is open for the admission of all reporters who may be induced to join, and by which a schedule of prices is fixed, and by which any member violating its rules as to prices is subject to a fine, is void, as tending to prevent a free and unrestricted competition in business. In Lovejoy v. Michels, 88 Mich. 15, 49 N. W. Rep. 901, the court held that, where the price of goods is not agreed upon at the time of the sale, the law implies an understanding to pay what the commodity is reasonably worth; "that a price arbitrarily fixed by a combination of manufacturers or dealers is not competent evidence to show a reasonable price for the goods sold by the members of the combination; that such combinations are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute that of unconscionable gain, whereby the participants become enriched at the expense of the consumer, beyond what he ought to pay under a healthy spirit of competition in the business community. The effect of such combinations is the same as that in restraint of trade, and public policy places its reprobation alike upon both. Combinations to control prices are against public policy and void, because they have a mischievous tendency, and are injurious to the best interests of the State, which require that all legitimate business shall be open to competition, that the current price of commodities shall be controlled by the law of supply and demand, and that the laws of commerce shall flow in their accustomed channels, and not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties."

In Oil Co. v. Adoue (Tex. Sup.), 19 S. W. Rep. 274, the court held that "every producer or vendor of" commodities "has the right to use all legitimate efforts to obtain the best price for the articles in which he deals, but when he endeavors to artificially enhance prices by suppressing or keeping out of the market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more pernicious than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, or other industrial commodities, might be artificially raised to a ruinous extent, far exceeding any naturally resulting from the proportion between supply and demand." In Greenh. Pub. Pol. 651, the rule is thus stated: "They may combine for the purpose of obtaining a benefit for themselves, which by law they can claim; but a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another." In Delz v. Winfree (Tex. Sup.), 16 S. W. Rep. 111, the defendants were wholesale dealers in slaughtered meats, and combined to refuse to sell meat to the plaintiff, a butcher. This was not sufficient, but the petition also alleged that the defendants also induced another dealer in slaughtered meat to likewise refuse to sell to the plaintiff. It was held that such interference with his business was a cause of action, and it was error to sustain a demurrer to the petition. In Murray v. McGarigle (Wis.), 34 N. W. Rep. 522, the complaint alleged a conspiracy to control the coal trade in Milwaukee, Wis. and, as a result, an injury to plaintiff in his business and reputation. The complaint is set out in full, and held good for civil damages. In Buffalo Lubricating Oil Co. v. Standard Oil Co. (N. Y. App.), 12 N. E. Rep. 825, the latter threatened plaintiff's customers with suits for infringement of its patents, depreciated its oil, etc. The object was to drive plaintiff out of business. I was held that the Standard Oil Company was liable for damages. The great weight of authority supports the doctrine that, where the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil

action for damages therefor. It is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation shown in the complaint.

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CONSTITUTIONAL LAW—EXECUTIVE POWERS—MANDAMUS TO GOVERNOR.—Const. Mo. art. 3, divides the power of government into three departments, legislative, executive, and judicial, and declares that no persons in charge of one department shall exercise any powers properly belonging to either of the others, except where permitted by the constitution. Article 5, §§ 1, 4, 5, vest the supreme executive power in the governor, require him to see that the laws are faithfully executed, and to perform such duties as are prescribed by law. Article 14, § 6, provides that he shall take an oath to demean himself faithfully in office. It was held by the Supreme Court of Missouri in State v. Stone, 25 S. W. Rep. 276, that *mandamus* will not lie to compel him to perform any duty pertaining to his office, ministerial or political, and whether commanded by the constitution or by some law passed on the subject. Sherwood, J., says:

Under these plain and comprehensive provisions, it must be apparent that any duty "prescribed by law" for the governor to perform is as much part and parcel of his executive duties as though made so by the most solemn language of the constitution itself. Conceding the validity of any given law, the fact that the duties which it prescribes are merely ministerial cannot take them out of the domain of executive duties, nor make them any the less those which "properly belong" to the executive department of the government. And should we, by our process, be able to compel the performance by the governor of such duties, we would, in effect, and to all intents and purposes, be performing those duties ourselves; for there can be no substantial distinction drawn between our assumption of duties pertaining to another department of the government, and our intervention resulting in the compulsory performance of such duties. "*Qui facit per alium*," etc. Nor does the fact that any duty which the law prescribes for the governor to perform might have been assigned to some other officer, who would have been amenable to the process of this court, alter the conclusion to be reached, or vary the result; for the fact would still remain that the act required to be done was nevertheless an official one, assigned by the legislative department of the government to be performed by the executive department, *eo nomine*,—by the governor, and by him alone,—and therefore, if he is not bound to obey the law in question as governor, he is not bound to act at all, since he only assumed to obey the laws in his gubernatorial capacity, and not otherwise or elsewhere. See Rice v. Austin, 19 Minn. 103 (Gil. 74). So that we should manifestly be trenching on the exclusive powers of two separate magistracies of the government, should we assume to exercise jurisdiction in this case.

Abundant authority establishes the position here taken that *mandamus* will not issue to the governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial; whether commanded by the constitution or by some law passed on the subject. People v. Governor, 29 Mich. 320; Hawkins v. Governor, 1 Ark. 570; State v. Warmoth, 22 La. Ann. 1, 24 La. Ann. 351; State v. Board of Liquidation, 42 La. Ann. 647, 7 South. Rep. 706, 8 South. Rep. 577; Mauran v. Smith, 8 R. I. 192; Rice v. Austin, 19 Minn. 103 (Gil. 74); Dennett, Petitioner, 32 Me. 508; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102; State v. Governor, 25 N. J. Law, 331; State v. Drew, 17 Fla. 67; Hovey v. State, 127 Ind. 588, 27 N. E. Rep. 175, which distinguishes or virtually overrules Gray v. State, 72 Ind. 567; People v. Bissell, 19 Ill. 229; People v. Yates, 40 Ill. 126; People v. Cullom, 100 Ill. 472; Turnpike Co. v. Brown, 8 Baxt. 490; Bates v. Taylor, 87 Tenn. 319, 11 S. W. Rep. 266; Towns v. State, 8 Ga. 360; Railway Co. v. Randolph, 24 Tex. 317; Appeal of Hartranft, 85 Pa. St. 433; Mississippi v. Johnson, 4 Wall. 475.

The same views are enunciated by several text writers. Thus High says: "While, as to purely executive or political functions devolving upon the chief executive officer of a State, and as to duties necessarily involving the exercise of official judgment and discretion, the doctrine may be regarded as uncontroverted that *mandamus* will not lie, yet as to duties of a ministerial nature, and involving no element of discretion, which have been imposed by law upon the governor of a State, the authorities are exceedingly conflicting, and, indeed, utterly irreconcilable. Upon the one hand, it is contended, and with much show of reason, that as to duties of this character the general principle allowing relief by *mandamus* against ministerial officers should apply, and the mere fact of ministerial duties having been required of an executive officer should not deter the courts from the exercise of their jurisdiction. Upon the other hand, it is held that under our structure of government, with its three distinct departments, — executive, legislative, and judicial,—each department being wholly independent of the other, neither branch can properly interfere with the duties of the others, and that as to the nature of the duties required of the executive department by law, and as to its obligation to perform those duties, it is entirely independent of any control by the judiciary. While the former theory has the support of many respectable authorities, and is certainly in harmony with the general principles underlying the jurisdiction, as applied to purely ministerial officers, the latter has the clear weight of authority in its favor, and may be regarded as the established doctrine upon this subject." High, Extr. Rem. (2d Ed.) § 118. Touching this subject, Wood says: "The attempt on the part of some of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of government, and in excess of their power, but also attended with great danger. If the courts may interfere with the discharge of any ministerial duties of the executive department of the government, they may with all; and we should have the singular spectacle of a government run by the courts, instead of the officers provided by the constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the others; and our safety, both as to national and State governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in

pursuance thereof. If the governor refuses or neglects to discharge his duties, or exceeds his powers in flagrant cases, there is ample remedy by impeachment and removal from office. It is not believed that the courts have the power to discharge his duties for him or to say what he shall or what he shall not do." Wood, Mand. pp. 123, 124. See, also, Merrill, Mand. § 97.

Although the precise point now presented has never been decided in this State, yet in State v. Fletcher, 39 Mo. *loc. cit.* 388, the clear intimation is made by this court, speaking through Wagner, J., that there was really no valid distinction between a political and a ministerial act of the governor, when considered with reference to the issuance of a *mandamus* against him.

There are many respectable authorities, however, which maintain views diametrically opposed to those here advanced. Most of them will be found collated in the brief filed for relator. Railroad Co. v. Moore, 36 Ala. 371; Middleton v. Low, 30 Cal. 596; Land Co. v. Routt, 17 Colo. 156, 28 Pac. Rep. 1125; Gray v. State, 72 Ind. 567; Magruder v. Swann, 25 Md. 173; Groome v. Gwinn, 43 Md. 572; Chumasero v. Potts, 2 Mont. 242; State v. Blasdel, 4 Nev. 241; State v. Chase, 5 Ohio St. 528; State v. Nicholls (La.), 7 South. Rep. 738. In addition to those cited, see Martin v. Ingham, 38 Kan. 641, 17 Pac. Rep. 162; State v. Thayer (Neb.), 47 N. W. Rep. 704.

The fact that the governor has voluntarily submitted himself to the jurisdiction of this court has been pressed upon our attention as a reason why we should pass on or adjudicate the question submitted; and cases have been cited—among them, Pacific Railroad v. Governor, 23 Mo. 360—as showing that, where the governor does not claim his exemption, then this court may adjudicate the matters at issue, and leave the governor to claim his exemption afterwards. But we regard such cases as wrong in theory, and unsafe and unsound in practice. If we have authority to render a judgment, then we have jurisdiction to enforce that judgment by all appropriate process, and need not inquire whether any exemption from that process will be pleaded. If, however, we have no jurisdiction over the chief magistrate, his consent will not confer it on us. We will not "assume a jurisdiction if we have it not."

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CRIMINAL LAW—HOMICIDE—RESISTING ARREST—JUSTIFICATION.—Upon the subject of justification for homicide committed in making arrest, the Supreme Court of Georgia in Robinson v. State, 18 S. E. Rep. 1018, decide the following points:

1. Persons orally "deputized" by the sheriff to assist him in making an arrest for felony are neither officers nor mere private persons while co-operating with the sheriff and acting under his orders, but their legal position is that of a *posse comitatus*.

2. A person summoned by the sheriff to act as one of a posse to aid in the execution of a warrant for felony in the sheriff's hands is protected, in any lawful act done by him to promote or accomplish the arrest of the accused person, to the same extent as he would be were he himself an officer having personal custody of the warrant, and charged with its execution; and, in order for him to have this protection, it is not necessary that he should be and remain in the actual presence of the sheriff, but if the two are in the same neighborhood, and acting in concert, the sheriff giving orders, and the other obeying them, either literally or according to their general spirit and purpose, with a view to effect the arrest in pursuance of the common design, it is sufficient.

3. One other than a known officer, who makes an arrest for felony without having the warrant in his own possession, ought to make it known, on demand, that the warrant exists, where it is, and that he claims to be acting under its authority or by command of the officer who has it in possession; but the omission to do so will not justify the party arrested, or sought to be arrested, in resisting the arrest, if he in fact already knows, or on reasonable and probable grounds believes, that he is under a charge of felony, that a warrant is out for his arrest, and that the arrest attempted is really in consequence of the warrant, and in execution of the same. If, however, the demand for authority be made under real ignorance of these things, and in good faith for the purpose of eliciting information actually wanted and needed, failure to comply with the demand would justify resistance to any reasonable and proper extent; and, even if carried so far as the slaying of the person endeavoring to make the arrest, the homicide might amount to manslaughter only, or, if such person made the first demonstration with a deadly weapon, the killing might be justifiable homicide.

4. The court, in its charge, having made the case turn chiefly on the right and power of the deceased to make the arrest, irrespective of the manner in which the power was executed and of the failure of the deceased to respond fully to the demand made upon him for his authority, and without reference to the good or bad faith with which that demand was made, the charge was erroneous, and the accused is entitled to a new trial.

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WILL—SELECTION OF ATTORNEY.—The Supreme Court of California, hold in *Re* Ogiers' Estate, 36 Pac. Rep. 900, that a provision in a will, whereby testator selects a certain person as the attorney of his estate, and directs that his executrix consult and employ him in all matters pertaining, does not constitute a selection binding on his executrix, but is merely advisory. Belcher, C. J., says:

The first question presented is, Was appellant entitled to be entered and recognized as the attorney of record for said estate, in the place of the attorneys employed by Mrs. Shorb? No cases are cited in support of appellant's contention in this regard, and it is admitted that none can be found; but it is said that, "since it was the declared will of the testatrix that appellant should act as the attorney of her estate, it is both reasonable and just that the will should be observed in this as well as in other respects." There is no such office or position known to the law as "attorney of an estate." When an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as the attorney of the executor, and not of the estate, and for his services the executor is personally responsible. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into possession (section 1613, Code Civ. Proc.); and while, in the settlement of his account, he will be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conduct-

ing the necessary proceedings or suits in courts (section 1616, *Id.*), still, such allowance can be made only to him, and not to the attorney (Henry v. Superior Court, 93 Cal. 569, 29 Pac. Rep. 230). And if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator. Our conclusion, therefore, is that the language employed by Mrs. Ogier, "I hereby select, as the attorney of my estate, John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate, and the requirements of this, my last will," did not constitute a selection which was binding on the executrix, but was simply an advisory provision, which she could disregard, if she chose to do so. In Young v. Alexander, 16 Lea, 108, the will under review contained the following clause: "I hereby nominate and appoint my nephew, M. B. Young, of Jackson county, Tennessee, as advisory and counsel of my said executors, who will assist them in winding up my unfinished and unsettled business." The executor refused to recognize or employ Young as counsel in the administration of the estate, whereupon he instituted the suit to compel such recognition and employment. The Supreme Court said that, "however persuasive such a provision may or might be, it can only be effective as an advisory provision;" and it was held that the provision was not binding upon the executor, and that he might ignore it, and appoint other counsel, at his discretion. In Foster v. Elsley, 19 Ch. Div. 518, the will under review contained the following clause: "And I declare that my solicitor, William Edward Foster, shall be the solicitor to my estate, and to my said trustees in the management and carrying out the provisions of this my will." It was claimed that this clause imposed on the trustees the duty of employing Foster as their solicitor, but it was held that it imposed no such trust or duty.

CHARITABLE CORPORATION—LIABILITY FOR ACTS OF SERVANTS.—It was held by the Court of Appeals of Kentucky in Williams v. Louisville Industrial School of Reform, that a purely charitable corporation, established by the State, is not liable for the negligent or malicious acts of its servants. Hazelrigg, J., says:

The appellee, the Louisville Industrial School of Reform, was created a body corporate by an act of the General Assembly in 1854, under the name of the Louisville House of Refuge. Its object and business was to take charge of such youths as might be committed to it, and care for their moral and physical training and education. It was a charity, and its purpose was reformation by training its inmates to habits of industry, and by instilling into their minds the principles of right living, to the end that they might become useful citizens of the State, rather than fill its prisons and poor houses. The incorporators and their successors are under the control and oversight of the legislature, and are mere instrumentalities of the commonwealth. The State interposed in behalf of neglected and abandoned children within its confines in its capacity of *parens patriæ* and assumed the guardianship of such children as were committed to the institution. It was an agency of the State, and maintained by taxation and State aid. The appellant a boy of 10 years of age, was committed to the care, control, and restraint of the institution, and his petition, brought by his next friend, Thomas, alleges that without fault on his part one of the servants and employees of the appellee, and known by it to be incompetent and unfit for such service, struck and beat the appellant in such eruel and inhuman manner that he was caused great suffering in mind and body, and was permanently injured and damaged, etc. To this petition a general demurrer was sustained, and the petition dismissed. The correctness of this judgment is the question on this appeal, and, while it has not been determined, directly, the general principles are well established. The functions of the institution are governmental. As said in Farnham v. Pierce, 141 Mass. 203, 6 N. E. Rep. 830: "It is a provision by the commonwealth, as *parens patriæ*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost." In Perry v. House of Refuge, 63 Md. 20, it was held that an action does not lie against a State house of refuge for an assault on an inmate by an officer thereof. It is there said: "Youths, in whom the seeds of vice have already germinated, are placed there under proper restraint, so that the growth of crime may be arrested or eradicated in its incipiency. Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from municipal and State treasuries. These are the funds of the institution, contributed by the managers, not for their own profit or benefit, but solely for the charitable purposes designated by its organic law. . . . Several of the most eminent judges in England expressed themselves with much emphasis in opposition to an allowance of damages out of a fund so held by fiduciary agents;" and the principle determined in a number of English cases, that "damages are to be paid out of the pocket of the wrongdoer, and not from the trust fund," was approved. It is contended that these cases followed the older decisions in England, and that the latter have been since overruled. Be this as it may, the principle announced seems entirely just and reasonable. If the funds of these institutions are to be diverted from their intended beneficent purposes by lawsuits and judgments for damages for negligent or malicious servants, their usefulness—indeed, their existence—will soon be a thing of the past. The judgment dismissing the petition is affirmed.

CONTRIBUTORY NEGLIGENCE — ELECTRIC WIRE.—In Haynes v. Raleigh Gas Co., 19 S. E. Rep. 344, decided by the Supreme Court of North Carolina, it was held that it was not contributory negligence for an intelligent boy, ten years old, when walking along the sidewalk, to grasp a guy wire hanging from an electric light pole to the ground, there being nothing to indicate that it was charged with electricity. The court said:

After a careful examination of all the evidence adduced on the trial, and after a full consideration of the argument of the able counsel for the defendant, we are clearly of the opinion that there was no evidence of contributory negligence, and his Honor should so have told the jury. A child is held to such care and prudence as is usual among children of his age and capacity. Murray v. Railroad, 93 N. C.

92. The defendant contends that the deceased was ten years of age, "a very healthy, intelligent, moral and industrious boy." Let us assume this to be true. As he returned to his home the morning of his death, passing along the streets of the city, he was trespassing on no one's property. He was walking where he had a right to walk, not by mere permission or invitation, but because he, as one of the public, had an absolute right so to do. The wire was on the sidewalk. Only one witness saw him when "he took hold of the wire, and the wire threw him in the ditch." That witness testified that "he did not have to reach for it. He just reached out his hand and took it. He did not have to stoop." No witness testified that there was anything from which even an adult could have inferred that this wire was carrying a deadly current of electricity, or, indeed, any current at all. True, the witness who saw him grasp the wire, when he came to his rescue, saw the fiery indications of the passing of the current from the wire to his hand, and several witnesses deposed that, after the accident and the throwing of the wire into a yard where there was wet grass, they noted that the wire was "steaming" at the point where one of its coils touched the sidewalk, and also at its extremity in the yard. Grant this to be true, and yet there is not, as it seems to us, any evidence that it was steaming when the deceased caught the wire, or, if it was, that its steaming was such as to carry, to a boy passing along, a warning that he must not touch it. We should be very loth to declare an adult guilty of negligence for grasping a wire such as this one under circumstances such as the defendant contends surrounded the deceased. We certainly cannot declare that this boy, whose conduct must be judged with due regard for his boyish nature and habits, negligently caused his own death. The instruction that "upon the evidence the plaintiff's intestate was not guilty of contributory negligence" should have been given.

## BOYCOTTING, ITS LEGAL PHASE.

1. Definition.
2. Lawful Combinations.
3. Unlawful Combinations.
4. Civil Liability.
5. The Right to an Injunction.

1. *Definition.*—The word "boycott" as a common noun is of recent origin. Its origin is this: Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark, in the District of Connemara. In his capacity as agent of Lord Earne, he served notice on the Lord's tenants imposing a certain condition. The tenants refused to comply with the notice and retaliated, and the captain's life appeared to be in danger; he claimed police protection, and to prevent civil war, the authorities had to send a force of soldiers and police to Lough Mark, and the harvest was gathered by armed Ulster laborers guarded by the soldiers. The tenants would not accept the condition nor allow others to take their places. So the word "boycott" originally meant violence if not murder by tenants. In America it means absolute ruin to the business of the person boycotted, unless he yields. The essential idea of boycotting is a confederation, generally secret, of many persons, whose intent is to injure another, by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution and vengeance of the conspirators.[1]

2. *Lawful Combinations.*—Combinations have existed in the United States similar to the boycott and antedate it many years. But the mere uniting of a number of men for mutual protection under the law is by no means unlawful. And it has been decided time and again that men are free to hire to do work for their fellow-man or corporation and cannot be bound by any regulation that has a tendency to make them lose the right to contract. When the acts of combinations are lawful and compatible with prosperity, peace and civilization they are legal. Freedom, individual and associated, is the palladium of this government, so long as it is regulated by laws; and the maxim, *sic utere tuo ut alienum non laedas*, so use your own as not to injure another's property, is one of the cardinal tenents of our political and social existence. Every man has a right to work for any one who will hire him and for any price he can obtain or is willing to accept. He may select his companions and refuse to associate with any person; his freedom in this respect is uncontrolled and unchallenged. Men may legally enter into combinations and societies resolving not to work for any party or corporation and so long as they do not interfere with such a party or corporation, nor prevent others from entering the employment of such party or corporation their acts are legal. And if they be working for a person, they may, when there is no conspiracy, leave his service, being responsible only in civil damages for breach of contract, if they quit before the expiration of the term engaged. At common law every person has individually, and the public also have collectively, a right to require that the course of trade shall be kept free from unreasonable obstructions. Every person has a right under the law, as between him and his fellow-men, to full freedom in disposing of his own labor or his own capital according to his own will. Every person

[1] State v. Glidden, 55 Conn. 76.

is also subject to the correlative duty arising therefrom, and is protected from any obstruction to the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others.[2] This is liberty regulated by law and is compatible with the peace and prosperity of the country. A restriction of such liberty by unlawful combinations would subvert the government and inaugurate a condition of affairs that would produce confusion. Under the common law as exemplified in the United States the individual is pre-eminent and the State subordinate; under the civil law the State was everything and the individual nothing. The rights vouchsafed by the common law cannot be surrendered without destroying the liberty of the employee and of the employer. Their interest should be mutual and reciprocal.

3. *Unlawful Combinations.*—In the absence of conspiracy, an employee may quit the service when not in violation of his contract, because he has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. But it must be borne in mind that this inalienable right is accorded him in the absence of conspiracy with others to injure his employer. When the effort of a combination is to dictate to an employer whom he shall discharge or withhold, the dictation is unlawful and an unwarrantable interference with the conduct of his business. If the employer can be compelled in this way to discharge one or more employees, he can be coerced in like manner to retain such workman as the combination may select. Under the same unlawful means his customers may be proscribed and his business in other respects controlled by the interference of this unlawful dictation; a dictation that is subversive of the first principles of our institutions and of the common law.[3] Though there may be no express intimidation, an intention to create alarm in the mind of an employer, and so to force his assent to an alteration in the mode of carrying on his business, is a violation of law.[4] The essential idea of boycotting is a combination or federation, generally secret, of many persons whose intent is to injure another, by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution and vengeance of the conspirators.[5] And every attempt by force, threat or intimidation, to deter or control an employer in the determination of whom he will employ, or what wages he will pay, is an act of wrong and oppression; and any and every combination for such a purpose is an unlawful conspiracy. In law the offense is the combination for the purpose, and no overt act is necessary to constitute it.[6] A boycott is an unlawful combination of many to cause a loss to a person, generally an employer, by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Such combinations are unlawful conspiracies, when their acts are done with malice, that is, with the intention to injure another without lawful excuse. It cannot be doubted that whenever persons enter into an unlawful conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person that person has a cause of action against the conspirators.[7] And such a conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means.[8] A man has a right to sell his property when he will, but if he sells it, or refuses to sell it, as a means of inducing or compelling another to commit an unlawful act, his selling or refusal to do so is itself unlawful. The same principle applies

[2] Erle's Trade Unions, p. 6.

[3] State v. Donaldson, 32 N. J. L. 151.

[4] Commonwealth v. Hunt, 4 Met. (Mass.) 111; Regina v. Rowlands, 5 Cox C. C. 436, 462; Doolittle v. Schanbacher, 20 Cent. L. J. 229; State v. Wilson, 30 Conn. 507; Carew v. Rutherford, 106 Mass. 10, 15.

[5] Crump v. Commonwealth, 84 Va. 927.

[6] Regina v. Duffield, 5 Cox C. C. 432; Parker v. Griswold, 17 Conn. 302; Master Stevedore Asso. v. Walsh, 2 Daly (N. Y.), 12; Springhead Spinning Co. v. Riley, L. R. 6 Eq. Cas. 551; Walker v. Cronin, 107 Mass. 564; State v. Glidden, 55 Conn. 76.

[7] Steamship Co. v. McGregor, 23 Q. B. 598, 624.

[8] Pettibone v. United States, 148 U. S. 197. See, also, Walker v. Cronin, 107 Mass. 555; Casey v. Typographical Union, 45 Fed. Rep. 135; State v. Stewart, 59 Vt. 273; State v. Glidden, 55 Conn. 76; Steamship Co. v. McKenna, 30 Fed. Rep. 48; Steamship Co. v. McGregor, 23 Q. B. 598; Crump v. Commonwealth, 84 Va. 927; State v. Donaldson, 32 N. J. L. 151; Haskins v. Royster, 70 N. Car. 601; Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669; Carew v. Rutherford, 106 Mass. 1; Moores v. Bricklayers' Union, 23 Weekly Law Bul. 48.

to labor. If a man uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring, or compelling that other to commit an unlawful act, the withholding or bestowing his labor for such a purpose is itself an unlawful and criminal act, or a boycott. It is lawful for a combination to sell the labor of those engaged in it for the highest price obtainable, and on the best terms. And when any number of men unite to sell their labor it is a lawful combination, so long as they do not conspire to control the business of other persons; such conspiracy is clearly unlawful and in opposition to the common law. The mechanic is not obliged to labor for any particular price. He has a right to fix his own price, but he has no right to say that no other mechanic shall work for less wages. If workingmen ask wages which an employer cannot afford to pay, they have no right to say that no others shall accept lower wages. Such dictation would be productive of derangement and confusion which would injure trade;[9] and the mere inducing one to break a contract with the intent to do the employer injury is malice of itself.[10]

4. *Civil Liability.*—That those who establish a boycott by conspiring to injure a man in business, are criminally liable is well-settled. But they are not only criminally but civilly liable. No man can justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are unlawful; so is the intentional procurement of a violation of individual rights, contractual or other, when there is no just cause for it. The intentional driving away of customers by show of violence;[11] the impeding or threatening servants or workmen;[12] the inducing persons under personal contracts to break their contracts,[13] are instances of such unlawful acts, which make the actor liable to the injured party in a civil action. The rule is that whenever any persons enter into an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of unlawful acts which produce private injury to some person, that person has a cause of action against the conspirators.[14] So a common carrier company against whom a conspiracy is directed by a combination of locomotive engineers, which is injured by acts of such combination, has a cause of action for its loss against all of those engaged in the conspiracy.[15] The facts in this case are these: P. M. Arthur, the chief executive of the Brotherhood of Locomotive Engineers, promulgated an order that there was a "legal" strike in force upon the Toledo, Ann Arbor and North Michigan Railroad, which order required the employees of connecting railroads not to handle and deliver any cars of freight in course of transportation from one State to another to said railroad or handle any of its cars of freight. This strike was caused because the railroad company refused to pay its engineers higher wages, and, hence, this boycott. It was decided by the court that the chief executive, Arthur, and all the members of the brotherhood engaged in causing loss to the railroad company by the boycott were liable for any actual loss inflicted in pursuance of this conspiracy; that the gist of any such action must be not in the combination or conspiracy, but in the actual loss occasioned thereby. No civil liability arose from the mere promulgation of the order of a "legal" strike, or its attempted enforcement, unless injury was done. But whenever a man or body of men do an act which in law and in fact is an unlawful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie.[16] If a single engineer, with intent to injure a railroad corporation, could, by threatening to quit or by actually quitting for the purpose, induce his employer to inflict a loss upon a

[9] People v. Fisher, 14 Wend. (N. Y.) 18.

[10] Chipley v. Atkinson, 23 Fla. 213; Bowen v. Hall, 6 Q. B. D. 333; Lumley v. Gye, 2 El. & B. 216.

[11] Tarleton v. McGawley, Peak, N. P. C. 270.

[12] Garrett v. Taylor, Cro. Jac. 567.

[13] Bowen v. Hall, 6 Q. B. 333; Lumley v. Gye, 2 El. & B. 216.

[14] Steamship Co. v. McGregor, 23 Q. B. 598, 624; Bowen v. Hall, 6 Q. B. D. 333, 337; Lumley v. Gye, 2 El. & B. 216. See, also, Rice v. Manley, 66 N. Y. 82; Benton v. Pratt, 2 Wend. (N. Y.) 385; Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669; Steamship Co. v. McKenna, 30 Fed. Rep. 48; Carew v. Rutherford, 106 Mass. 1; Moores v. Bricklayers' Union, 23 Weekly Law Bul. 48.

[15] Toledo, etc. Railroad Co. v. Pennsylvania Co., 54 Fed. Rep. 730.

[16] Bowen v. Hall, 6 Q. B. D. 333, 337. See also, Lucke v. Cutters' Assembly (Md.), 26 Atl. Rep. 505.

connecting company by unlawfully refusing to interchange interstate freight, the connecting company could hold the engineer civilly liable for any loss. This principle is illustrated in the case where a manufacturer recovered damages from a party who had induced his employees to break their contract, when such interference was with the intention of injuring the manufacturer.[17]

This doctrine is sound and is followed by the English and American courts. There must be a restraining power to protect business. If this power is not exercised no one is safe in engaging in any vocation. Because if the unlawful combinations are to control business, they may with like reason determine what business others shall engage in, when and where it shall be carried on and under what conditions. If combinations of men demand and receive power outside of law, over and above law, where is the limit of their requirements. If the rights of business men are those only which an organization of men is willing to give, then freedom does not exist. A combination that has for its object the procuring of the highest price for labor of its members without interfering by boycott to intimidate the employers or other laborers, is a legal body and its object commendable; but it must not go outside of its legitimate field to boycott capitalists or laborers; it is as unlawful to boycott laborers as it is capitalists.

5. *The Right to Injunction.*—As to the right to issue a mandatory injunction to restrain the conspirators, the rule is that when there is a willful and unlawful invasion of plaintiff's right, against his protest and remonstrance, the injury being a continuing one, a mandatory injunction may issue in the first instance,[18] and such order restraining the act complained of will be extended to the defendant's servants, workmen and agents, and it is of course to insert these words.[19] Where the injury is a continuing one, a mandatory injunction will be issued before the case is heard on its merits.[20] The employees while in the employ of the company must obey the mandatory injunction, but may, without contempt of court, avoid or evade obedience thereto by ceasing to be such employees,[21] otherwise the injunction would be, in effect, an order on them to remain in the service of the company which is not within the power of a chancery court. And if they leave the employment of the defendant companies to injure the complainant company, they do an unlawful act, rendering themselves liable in damages to the injured party. No matter how inadequate the remedy at law, the power of a court of equity cannot be extended by mandatory injunction to compel the inforcement of personal service against either the employer or the employee.[22] The fact that a combination of men is in its origin and general purposes innocent and lawful is no ground of defense when the combination is turned to the unlawful act of restraining interstate and foreign commerce.[23]

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[17] Walker v. Cronin, 107 Mass. 555. See also, Lumley v. Gye, 2 El. & B. 216; Bowen v. Hall, 6 Q. B. D. 333, 337.

[18] High on Inj., 2.

[19] Kerr on Inj., 559; Mexican Ore Co. v. Guadalupe Co., 47 Fed. Rep. 351: Wellesley v. Moonington, 11 Beav. 180; Smith v. Smith, L. R. 20 Eq. 500; Ivimey v. Stocker, L. R. 1 Ch. App. 396.

[20] Broome v. Telephone Co., 42 N. J. Eq. 141; Robinson v. Byron, 1 Bro. C. C. 588; Lane v. Newdigate, 10 Ves. 192; Toledo, etc. Railroad Co. v. Pennsylvania Co., 54 Fed. Rep. 730.

[21] Toledo, etc. Railroad Co. v. Pennsylvania Co., 54 Fed. Rep. 730.

[22] Lumley v. Wagner, 1 De Gex, M. & G. 604; Stocker v. Brockelbank, 3 Mac & G. 250; Pickering v. Bishop, 2 Younge & C. Ch. 249; Johnson v. Railroad Co., 3 De Gex, M. & G. 914; Toledo, etc. Railroad Co. v. Pennsylvania Co., 54 Fed. Rep. 730. See, also, United States v. Workingmen's Amalgamated Council, 54 Fed. Rep. 994.

[23] United States v. Workingmen's Amalgamated Council, 54 Fed. Rep. 994.

## MUNICIPAL CORPORATION — INJURY TO TRAVELER.

### MULLEN V. CITY OF OWOSSO.

*Supreme Court of Michigan, April 17, 1894.*

Where the owner of the carriage, with whom plaintiff was riding, carelessly drove over a pile of sand in the street, with full knowledge of the obstruction, at a rate of speed not allowed by ordinance,—overturning the carriage, and causing the injuries complained of,—the city was not liable. McGrath, C. J., and Hooker, J., dissenting.

LONG, J.: The plaintiff, a woman about 34 years of age, was riding with Mr. Pond in a private carriage drawn by one horse along a public street in the city of Owosso. Overtaking Mr. Sanders, who was driving in the same direction, Mr. Pond attempted to pass him. Sanders was driving at a rapid rate, and Mr. Pond, in attempting to pass started his horse rapidly forward. The

parties raced for a distance, when Mr. Pond ran over a pile of sand in the highway. His carriage was overturned, and plaintiff thrown out and injured. The proofs are clear that Mr. Pond knew that a building was being erected by the side of this street, and that a mortar box and other materials were out in the street, in front of it. He stated that on a former trial he testified that he knew the street was incumbered by such materials, and thought that somebody was liable to get hurt there. Yet, in view of this knowledge, he carelessly drove his horse at the rate of more than six miles an hour in the street, contrary to the ordinances of the city. The court directed the jury: "If you find from the evidence in this case that the plaintiff would not have been injured but for the neglect of the city to give proper warning, then the plaintiff would be entitled to recover, unless you find that Mr. Pond knew of the obstruction to a portion of this street, and heedlessly drove over the obstruction; that he would be guilty of gross negligence, and plaintiff could not recover." Again the court said: "If the plaintiff in this case voluntarily entered the private conveyance of Mr. Pond, and voluntarily trusted her person and safety, in that conveyance, to him, by voluntarily entering into the private conveyance of Mr. Pond, she adopted the conveyance, for the time being, as her own, and assumed the risk of the skill and care of the person guiding it. So, if you find that Mr. Pond was negligent, in driving fast, the plaintiff could not recover." The jury returned a verdict in favor of the defendant.

The only question presented by the brief of plaintiff's counsel is whether the negligence of Mr. Pond is imputable to the plaintiff. This question was settled in the affirmative in Railroad Co. v. Miller, 25 Mich. 274 (decided by this court in 1872), and has not since been departed from. Counsel claims that some doubt has been cast upon this doctrine by some of the later decisions, and cites Battishill v. Humphreys, 64 Mich. 503, 31 N. W. Rep. 894. In that case a child three years of age was run over by an engine upon a railroad operated by defendant, as receiver. The question was raised whether the negligence of the parents in permitting the child to go upon the track was imputable to the child. Mr. Justice Morse held that such negligence was not imputable to the child. The other justices expressed no opinion upon that point. In Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. Rep. 584, the question whether the negligence of the parents was imputable to a child three years of age was again presented; and, upon a full hearing, it was the unanimous opinion of the court that such negligence was not imputable to the child. Other cases of like character have been presented to this court, involving that question; and the rule is now established that, when the child brings the action for negligent injuries, the negligence of the parents cannot be imputed to it. But the present case presents quite a different question. Here a person of the age of discretion voluntarily enters a private conveyance of another, to ride, and by the carelessness of that person is injured. The rule laid down in the Miller Case, cited above, excludes a recovery. It has been too long settled to be now disturbed. In Schindler v. Railway Co., 87 Mich. 410, 49 N. W. Rep. 670, the rule was recognized. It was there said of the Miller Case: "This is the general rule, and has since been followed in this State." The rule was also recognized by this court in Cowan v. Railway Co., 84 Mich. 583, 48 N. W. Rep. 166. Judgment is affirmed.

NOTE.—The cases upon the subject of imputed negligence are not harmonious, but the great weight of authority is against the contention that the negligence of the driver of a vehicle should be imputed to the passenger; the case of Thorogood v. Bryan & C. B. 115, which is considered the leading case sustaining the proposition, having been overruled in England and repudiated in this county, generally, though followed in some States. That was a case of the collision of two omnibuses. The action against the owner of one by a passenger of the other was defeated upon the ground of contributory negligence, upon the theory that the passenger was so identified with the driver of his vehicle as to be chargeable with his negligence. This decision seems to rest upon an inference that the driver is the agent of the passenger, or at least that he is under the direction and control of the passenger. The case was disregarded in Rigby v. Hewitt, 5 Exch. 239, and distinctly overruled in The Bernina, 12 Prob. Div. 58; Mills v. Armstrong, 13 App. Cas. 1. In the last case, Lord Herschell commented as follows upon the case of Thorogood v. Bryan: "In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person, whose servants have been guilty of negligence, to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense, as against the passenger, when suing another wrong-doer. To say that it is a defense, because the passenger is identified with the driver appears to be to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue." In Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, Mr. Justice Field uses the following language: "The truth is, the decision of Thorogood v. Bryan, rests upon indefensible grounds. The identification of the passenger with the negligent driver or the owner, without his co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver, or the person managing it, is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." The doctrine of Thorogood v. Bryan has met with similar treatment in most of the State courts of last resort, and, as to public conveyances, may be said not to state the law correctly. The reasons upon which these cases rest are equally conclusive in cases where the injured party was riding in a hired carriage with a driver from a livery stable; in cases where the passenger does not, as a matter of fact, exercise such control over the driver as to make him his servant. See Little

v. Hackett, *supra*; Missouri Pac. Ry. Co. v. Texas Pac. Ry Co., 41 Fed. Rep. 316; Larkin v. Railway Co. (Iowa), 52 N. W. Rep. 480; Railroad Co. v. Stelbrenner, 47 N. J. Law, 161; Randolph v. O'Riorden (Mass.), 29 N. E. Rep. 583. The dissenting judges say that "in cases like the present the question becomes one of fact; the test of the passenger's responsibility for the negligence of the driver depending upon the passenger's control, or right of control, of the driver, so as to constitute the relation of master and servant between them. Railway Co. v. Kutac, 72 Tex. 643, 11 S. W. Rep. 127; Cahill v. Railway Co. (Ky.), 18 S. W. Rep. 2; Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. Rep. 516; Dean v. Railroad Co., 129 Pa. St. 514, 18 Atl. Rep. 718; McCaffrey v. President, etc., (Sup.) 16 N. Y. Supp. 495; Masterson v. Railroad Co., 84 N. Y. 247; Noyes v. Boscawen, 64 N. H. 361, 10 Atl. Rep. 690; Follman v. City of Mankato, 35 Minn. 522, 29 N. W. Rep. 317; Railroad Co. v. Hogeland, 66 Md. 149, 7 Atl. Rep. 105; State v. Boston & M. R. Co., 80 Me. 430, 15 Atl. Rep. 36; Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. Rep. 452; Railroad Co. v. Spilker (Ind. Sup.), 33 N. E. Rep. 280. It should not be inferred that a passenger can shelter himself behind the fact that another is driving the vehicle in which he rides, and relieve himself from his own personal negligence. What degree of care should be required in the selection of a driver, or in observing and calling attention to dangers unnoticed by the driver, must depend upon the circumstances of each case.

It remains to inquire whether this question can be considered an open one in this State. The question before us is doubtless supposed by many to have been settled in the case of Railroad v. Miller, 25 Mich. 274, and it cannot be denied that the syllabus of that case would confirm the opinion. The facts in that case were these: The plaintiff, a woman, was riding with Eldridge, being in his employ. The wagon was struck upon a railway crossing, near which was a wood pile belonging to defendant, which obscured the view of the railroad. The only allusion to the question here discussed arose as follows: The court said: "So that the only negligence which can be claimed in the mode of running the train must rest upon the ground that the company, having obscured the view and deadened the sound of the approaching train by the mode of piling their wood, were bound, for that reason, to run at much less than their usual rate of speed, in approaching that crossing, or to keep a flagman there, or use some other extra means to warn people traveling the highway of the approach of trains from the west. The materiality of this question must depend upon another,—whether the plaintiff's own negligence, or that of Eldridge, who was driving the team, contributed to the injury, within the meaning of the generally settled rule upon this subject; for, as she was riding with Eldridge, the owner and driver of the team, any negligence of Eldridge equally affects her rights in this suit, as was properly held by the court." It will be noticed that the subject is passed without discussion, and the court proceeds with a lengthy review of the doctrine of contributory and comparative negligence. On page 286 the court states the established facts, among which are the following: "Eldridge was slightly deaf, but the plaintiff herself was not." "They kept on, still upon the walk (the train in sight), not stopping to listen, and looking neither to the right nor the left, neither up nor down the track. They are almost upon it. He (the witness) still thinks they will stop, but they move steadily on," etc. Again: "No logic can find in it, or extract from it (the evidence), the faintest manifestation of common prudence, which the circumstances demanded, in approaching the crossing." The court finds from the testimony of the plaintiff herself that neither Eldridge nor herself used any caution whatever. One of two things must be admitted, under the facts stated, viz.: (1) that plaintiff was relieved from all responsibility by the fact that she was riding with Eldridge, and was under no obligation to look for the train; or (2) that the failure to do so was contributory negligence upon her part which should have precluded a recovery by her, in which case the question of imputed negligence was unimportant. The opinion apparently takes the latter view, so far as plaintiff's own negligence is concerned, where it says, "I think the evidence tended affirmatively to prove actual and gross negligence on their part, which contributed directly to produce the injury complained of." From the finding, I think it may be said that the question before us was not necessarily involved in the Miller Case, and that it was not considered the controlling point. If it is to be treated as conclusive, against the overwhelming weight of authority in the United States and England, we shall apparently accept an incidental remark in an opinion as decisive upon an important principle, which deserved a full discussion before being settled. An examination will show that this decision has never since been applied, beyond a recognition of the doctrine in cases where it was not involved in the decision. It was mentioned and recognized in Cuddy v. Horn (Mich.), 10 N. W. Rep. 32, but the court disposed of the case upon the ground that the passenger upon a yacht had not control of the management. In Schindler v. Railway Co., 87 Mich. 411, 49 N. W. Rep. 670, the court again recognized the rule saying, that it was settled in Railway Co. v. Miller, but that it did not apply, because the defendant was guilty of wantonness. The plaintiff was a child riding with a neighbor. Mr. Justice Champlin, in a dissenting opinion, protested against the doctrine. 87 Mich. 419, 49 N. W. Rep. 670. In Battishill v. Humphreys, 64 Mich. 509, 31 N. W. Rep. 894, Mr. Justice Morse uses the following language: "I am not content to let the question pass as a settled one in this State. At least, I am not willing to assent to the proposition that the negligence of any other person can become the contributory negligence of a plaintiff, without his fault. 64 Mich. 508, 31 N. W. Rep. 894. In the case of Shippy v. Village of Au Sable, 85 Mich. 292, 48 N. W. Rep. 584, Mr. Justice Morse expressed satisfaction with the views in the Battishill Case, and added, "I am also satisfied that the great weight of authority in this country is opposed to the contention of the defendants." In neither of these cases was the doctrine of Railway Co. v. Miller applied. It seems, therefore, that the authority of the case of Railway Co. v. Miller has been repeatedly questioned. The time has arrived when the question must be settled. I think it should be in conformity to the weight of authority, and the better rule. The judgment should be reversed, and a new trial ordered."

## JETSAM AND FLOTSAM.

### SUSPENSION OF CROSS-EXAMINATION TO PROVE EXISTENCE OF DOCUMENT.

The ruling of Judge Bradley in Pollard v. Breckenridge, sustaining the right of counsel who has a witness under cross-examination to suspend the cross-examination by leave of the court when the witnesses denies the writing or the existence of a supposed do-

cument and to interject, by calling other witness, the testimony desired to establish the existence of such document, in order to go on with the cross-examination by the aid thereof, applies, in a way perhaps new to many of the profession, a principle already well established, in other applications at least, in the modern practice of examining witnesses. There was a time when questions as to competency, for instance, of the witness must be determined before the witness was sworn in chief. It is now the general practice to allow a witness, after being sworn in chief, to be cross-examined as to compentency, and to allow the cross-examining counsel, if incompetency is not established, to interpose with other witnesses to establish it if he can, before allowing the direct examination to go on. In the same way, if the incompentency suggested is not general, but partial, extending only, for instance, to qualify the witness to express an opinion, in order that the preliminary question may be determined by the judge before the evidence offered for the jury is received. The current reports of the trial in Washington indicate that a similar principle was applied to cross-examination on credibility.

The defendant Breckenridge, stated that he had had no correspondence with the plaintiff during 1886. He was asked on cross-examination whether he had not written certain manuscript and placed it in the hands of a typewriter to be typewritten and sent to the plaintiff. The paper not being in possession of the cross examining counsel, and the copy that was claimed to have been made and sent to the plaintiff also not being in existence, the court ruled that the cross-examination might be suspended and proof made that defendant did write such manuscript (and of its contents), did have it copied, that the copy was received by the plaintiff and destroyed, and, such proof having been made, that the defendant might be cross-examined in regard to it, just the same as though the manuscript had been handed to him for that purpose.—*University Law Review.*

AN UNFORTUNATE CREDITOR.

A case in the last Texas Reports has brought up squarely the question whether two joint debtors, by agreeing with each other to become respectively principal and surety, and by notifiying the creditor of their agreement, may compel him to respect its terms, and to treat them thereafter as principal and surety. Hall v. Johnson, 24 S. W. Rep. 861, was the case of a continuing partner who agreed to indemnify his retiring copartner against payment of the firm debts; notice of this arrangement was given to the creditor. The majority of the court held that an extension of time given to the continuing partner discharged the retiring copartner, Fisher, C. J., dissenting. Each side marshalled its authorities (many of which are collected in 17 Amer. & Eng. Enc. Law, 1131) in full array, and the dissent went into a more extended examination of the principles involved.

The English courts, not content with the theoretical difficulty to the question, have still further complicated the question by disputing the effect of the decision in Oakeley v. Pasheller, 10 Bligh (N. S.), 548, in the House of Lords in 1836. In Swire v. Redman, 1 Q. B. D. 536, the court held that notice to the creditor of the new arrangement did not oblige him to treat the debtors as principal and surety, and said that Oakeley v. Pasheller went on the ground that the creditor had virtually assented to the new arrangement. Lord Justice Lindley, in his work on Partnership (5th edition, p. 252), considered this view of Oakeley v. Pasheller, to be correct; but now in Rouse v. Bradford Banking Co., 38 Sol. Law Jour. 270, he says that Swire v. Redman took the wrong view of Oakeley v. Pasheller, and that the law is settled the other way. A. L. Smith, L. J , agreed with him, and Kay, L. J., took the contrary view.

These cases have tied the Gordian knot so tight that it needs a decision of the House of Lords to cut it; but in the United States the case may be decided on principle. If we free the question from all analogy as to the rights of mortgagees who have notice of a conveyance by the mortgagor, and of a covenant by the grantee to pay the mortgage debt, it is simply this: Can two joint debtors agree to become principal and surety, and compel the creditor to treat them as such? Surely not. The creditor has a legal right,—how can his debtors force him to relinquish it? Generally the position of his debtors will not be a matter of importance to a creditor, and therefore it will not seem so unjust that equity, in order "to do a great right," should do a "little wrong," by depriving him of his theoretical right. But it may be very material to him. Suppose he thinks that the surest way to secure full payment of the debt is to take the time note of one of the debtors. If they are still joint debtors he may safely do this, and still hold the other; if they are principal and surety he must take the risk of being able to prove that he expressed himself as "reserving all rights against the surety,"—a risk which was not part of his original contract, but which is now forced upon him against his will. It is no answer to say that there are complete precautions against this risk, for there is no reason why he should be compelled to take such precautions.

"The contention is that the two had a right to create a right in themselves, which, if observed, must derogate from the plaintiff's right, and then to say that it is inequitable in the plaintiff to act in derogation of this act so created. Surely the inequity begins earlier, and is in the defendant's derogating from the plaintiff's right without his consent." 1 Q. B. D. 542. This is the view of two of the Lords' Justices, for Lindley, L. J., although he does not think Swire v. Redman, to be law, says he should follow it if he were free to do so. If the Texas court is correct, the creditor must at his peril remember to state that he reserves all his rights against the retiring partner, and, further, must be able to prove that he did so. Fisher, C. J., seems to hit the truth when he says, 24 S. W. Rep. 866: "An Act of the Legislature, or a judicial decision, that reaches to this extent, would unquestionably be opposed to the spirit of the fundamental law that protects the inviolability of contracts."

An interesting article in support of this view may be found in 14 *Canadian Law Times*, 57; but it must be admitted that the preponderance of authority is other way.—*Harvard Law Review.*

## BOOK REVIEWS.

THE CRIMINAL CODE OF CANADA.

Besides what its subject indicates, this volume contains the Canada evidence act of 1893, the extradition act, the extradition convention with the United States, the fugitive offenders act and the house of commons debates on the code. The work is designed to give a full general view of the criminal law and procedure of Canada and is certainly invaluable there. It would seem also to be of interest to criminal practitioners in the United States. It is admirably prepared in clear type, has nearly a thousand pages and is published by Whiteford & Theoret, Montreal.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**



1. ACCOUNT RENDERED—Failure to Object.—Where a brewery agrees, with retail dealers that it will furnish them beer at the same price as other breweries, and the latter sell at six dollars per barrel, such dealers are not bound to pay such brewery seven dollars per barrel for beer furnished on a running account for eight years because it rendered accounts as the beer was furnished, in which it was charged at seven dollars per barrel, and charged it in the purchasers' pass book at the same price, and the latter made no objection thereto.—KUSTERER BREWING CO. v. FRIAR, Mich., 58 N. W. Rep. 52.

2. ADMINISTRATION — Foreign and Ancillary.— The power of courts to order the remission of the funds belonging to a foreign succession to the representatives of the succession authorized to receive them, by the courts of the domicile of the deceased, we consider undoubted. Its exercise is necessarily a matter of discretion, depending on the circumstances of each case, and is a consequence of the comity which prevails between nations in amity with each other.—SUCCESSION OF GAINES, La., 14 South. Rep. 602.

3. ADVERSE POSSESSION AGAINST CITY.—When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for 10 years, the title thereto vests absolutely in such occupant.—LEWIS v. BAKER, Neb., 58 N. W. Rep. 126.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A deed of assignment by an insolvent debtor for the benefit of his creditors which does not on its face appear to be an assignment of all of his unexempt property is void on its face against his creditors.—TARBOX v. STEVENSON, Minn., 58 N. W. Rep. 157.

5. ASSUMPSIT—Money Had and Received.—Where one buys goods, agreeing, as part of the consideration, to pay debts of the seller and converts the goods into cash, an action on the common counts for money had and received may be maintained against the purchaser by one of the creditors whom he agreed to pay.—POTTS v. FIRST NAT. BANK OF GADSDEN, Ala., 14 South. Rep. 665.

6. BANKS—Draft—Damages.—The damages recoverable for the refusal of a bank to pay a check drawn upon it by one who has funds with the bank wherewith to make such payment should not exceed such amount as reasonably and fairly, in the natural course of things, would result from such refusal.—BANK OF COMMERCE v. GOOS, Neb., 58 N. W. Rep. 84.

7. BASTARDY— Sufficiency of Complaint.—The complaint in a bastardy proceeding, where it charges the date of the birth of the child, need not set out the time or place when or where it was begotten.—ROBB v. HEWITT, Neb., 58 N. W. Rep. 88.

8. CARRIERS—Passenger—Contributory Negligence.—Where a train started as a passenger was about to alight, the fact that the brakeman warned the passenger while on the step was insufficient to fix negligence conclusively on the passenger, if he was then in motion and could not stop.—LOUISVILLE, E. & ST. L. C. R. CO. v. BEAN, Ind., 36 N. E. Rep. 443.

9. CARRIERS — Defective Roadbed.—In an action against a railroad company for personal injuries sustained by a passenger because of the alleged unsafe condition of its roadbed, evidence of the general bad condition of the roadbed is competent.—TEXAS TRUNK R. CO. v. JOHNSON, Tex., 25 S. W. Rep. 417.

10. CARRIERS OF PASSENGERS—Starting Street Car.—On the issue of the driver's negligence in suddenly starting a street car from which plaintiff was alighting, after evidence that the car was being driven rapidly between switches, a remark of the driver to the conductor that he was behind time is not competent, as *res gestæ*, to explain the driver's state of mind.—GARDNER v. DETROIT ST. RY. CO., Mich., 58 N. W. Rep. 49.

11. CONSTITUTIONAL LAW—Decree of Sister State.—Under Const. U. S. art. 4, § 1, providing that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, a bill will not lie to avoid a decree of a sister State on the ground of the fraud or gross negligence and mistake of parties to the decree.—MOONEY v. HINDS, Mass., 36 N. E. Rep. 484.

12. CONSTITUTIONAL LAW—Legislative Powers.—It is unconstitutional, in Massachusetts, in an act granting to women the right to vote in town and city elections, to provide that the act shall take effect throughout the commonwealth on its acceptance by a majority vote of the voters thereof.—IN RE MUNICIPAL SUFFRAGE TO WOMEN, Mass., 36 N. E. Rep. 488.

13. CONTRACT.—An indorsement by defendant on an order for goods by one, A, reciting that defendant, in consideration of A's being allowed 30 days for payment, "hereby guaranties payment of the amount within 30 days," is an original, and not a collateral, undertaking, and defendant is liable at once on his direct promise to pay.—SHEARER v. R. S. PEELE & CO., Ind., 36 N. E. Rep. 455.

14. CONTRACT — Cancellation.—When one has executed a contract, the bare fact that he did not read it or know its contents will not relieve him from it.—QUIMBY v. SHEARER, Minn., 58 N. W. Rep. 155.

15. CONTRACTS — Consideration.—The payment by a debtor of a part of an adjudicated liability is not a sufficient consideration to support a promise by the creditor to cancel the whole liability, though the debtor be insolvent.—BEAVER v. FULP, Ind., 36 N. E. Rep. 418.

16. CONTRACTS — Mutuality — Construction.—Though an agreement for the sale and shipment of a certain amount of coke is expressly conditioned on the ability of the seller to induce operators to build ovens and make the coke, and it provides for notice by the seller to the buyer, at specified times, as to how much of the

entire quantity of coke can be supplied during certain periods, the seller is bound thereby so soon as he induces operators to build ovens and make the coke, and hence the agreement is mutual.—SHEFFIELD FURNACE CO. v. HULL COAL & COKE CO., Ala., 14 South. Rep. 672.

17. CONTRACTS — Payment — Notice.—A bank which had sold coupons to plaintiff paid her the amount of certain coupons, and received them as its own, but undertook to return them, when not paid by the obligors, by deducting the amount which it had paid to her from a larger amount which it owed to her, and by sending her a check for the balance thus reached: Held, the plaintiff could sue the bank for the larger sum without first returning the check or coupons.—FOLSOM v. BALLOU BANKING CO., Mass., 36 N. E. Rep. 469.

18. CONTRACT—Pleadings—Usury.—The Code of Civil Procedure provides that a pleader shall state facts, and not conclusions; and it is essential to a plea of usury that it state with whom the agreement alleged to be usurious was made, when made, where made, and the facts which it is alleged make the transaction usurious. It must also state the amount of interest agreed to be paid, taken, or reserved, or that was paid, taken, or reserved, in the transaction.—RAINBOLT v. STRANG, Neb., 58 N. W. Rep. 96.

19. CONTRACT — Voluntary Payments.—Where one, with knowledge of all the facts, makes a contract, and for three years makes payments thereunder, he cannot recover the sums paid, on the ground that he was entitled to what he received without payment.—STECK v. NORTHERN COLORADO IRR. CO., Colo., 35 Pac. Rep. 919.

20. CONVERSION—Sale of Mortgaged Chattels.—A petition alleging that the plaintiff held a mortgage on certain sheep, as defendant knew; that the mortgagors, at defendant's instigation, sold and disposed of all the sheep, and that defendant, for the purpose of defrauding plaintiff, collected and returned the proceeds of the sale, alleges an unlawful sale in hostility to plaintiff's mortgage, and therefore a tortious conversion by the parties making the sale.—CONE v. IVINSON, Wyo., 35 Pac. Rep. 933.

21. CONVERSION—Title to Property.—Where a person employs a lithographic company to put certain designs on stones for the purpose of doing certain printing therefrom for him, under an agreement whereby the stones are to belong to such company, he has no title to, or right to possession of, such stones that will enable him to maintain an action against a third party for their conversion, though he paid for the labor of putting such designs on the stones.—KNIGHT v. SACKETT & WILHELMS LITHOGRAPHING CO., N. Y., 36 N. E. Rep. 392.

22. CORPORATION—Pleading.—An exception that the petition of a corporation does not show that suit was authorized will be overruled if the affidavit accompanying the petition discloses the name of the vice-president of the company, and affirms the truth of its allegations; the necessary inference therefrom being that the suit was properly authorized.—LACAZE v. THEIR CREDITORS, La., 14 South. Rep. 601.

23. COUNTY—Action Against.—Since Gen. St. 1883, § 525, provides that in all suits against a county the name in which the county shall be sued shall be "the board of county commissioners of the county of——" a judgment for plaintiff in a suit against "P county" is a nullity.—BOARD OF COM'RS OF PHILLIPS COUNTY v. CHURNING, Colo., 35 Pac. Rep. 918.

24. COUNTY CLERK — Powers—Contract.—Pol. Code, § 1115, providing that the clerk shall have printed a sufficient number of copies of the lists of voters, taken in connection with Laws 1891, p. 309 (County Government Act, § 34), providing that the board of supervisors must provide printed copies of the "great register" and of other books and papers there mentioned, does not empower the clerk to make a contract for the printing of the "great register" which shall be binding on the county.—FRANZEN v. SAN DIEGO COUNTY, Cal., 35 Pac. Rep. 897.

25. COURTS — Executive Questions.—Any question submitted by the governor to this court for its opinion is entitled to respectful consideration; but the court must determine for itself as to the importance of the question, the solemnity of the occasion, and the nature of the answer proper to be returned under the particular circumstances of each case.—IN RE PENITENTIARY COM'RS, Colo., 35 Pac. Rep. 915.

26. COURTS—Jurisdiction — Appellate Courts.—In an action by a property owner against the city, which has taken part of his property for street purposes, to enforce payment of the damages assessed therefor, as reported by the commissioners and confirmed by the council (and thereupon unconditionally payable by the treasurer, under Rev. St. 1881, § 3182), an appeal from the superior court does not call for a mandate to the city authorities, but merely for a money judgment, which, if less than $3,500, brings the case within the jurisdiction of the appellate court. — CITY OF TERRE HAUTE v. BLAKE, Ind., 36 N. E. Rep. 422.

27. CRIMINAL CONVERSATION—Evidence.—In an action for criminal conversation with plaintiff's wife, letters written by plaintiff's wife to defendant are competent to show a criminal intimacy between them, and also to show alienation of the wife's affections.—DALTON v. DREGGE, Mich., 58 N. W. Rep. 57.

28. CRIMINAL EVIDENCE—Embezzlement—Pleading.—An indictment charging that defendant, "being then and there an officer, to-wit, the financial secretary," of a private incorporated society, embezzled money, is sustained by proof that he was duly elected and installed, and that, while acting as such officer, he embezzled the money; and it is immaterial that he gave no bond, as required by the by laws of the society.—COMMONWEALTH v. LOGUE, Mass., 36 N. E. Rep. 475.

29. CRIMINAL LAW—Assault with Intent to Kill.—Deliberation and premeditation are not necessary elements of an assault with intent to murder, but malice aforethought and an intent to murder are necessary.—STATE v. FISKE, Conn., 28 Atl. Rep. 572.

30. CRIMINAL LAW—Compelling Recall of Accused.—The court may compel an accused, who has offered himself as a witness, to be recalled for further cross-examination.—THOMAS v. STATE, Ala., 14 South. Rep. 621.

31. CRIMINAL LAW—Evidence—Confessions. — A confession made by defendant to the officer who arrested him, and who told him that he had better tell the truth, is inadmissible.—COMMONWEALTH v. MYERS, Mass., 36 N. E. Rep. 481.

32. CRIMINAL LAW — Larceny from Storehouse. — To constitute the crime of larceny from a storehouse, under Code, § 3789, it is not sufficient that the building in which the crime was committed was built for a storehouse, but it must at the time of the offense have been used for that purpose.—JEFFERSON v. STATE, Ala., 14 South. Rep. 627.

33. CRIMINAL LAW—Murder.—When there is evidence that petitioner, indicted for murder, and others, conspired to do an unlawful act, the execution of which made it probable, under the circumstances, that a homicide not specially designed would be committed, and that in the execution of such conspiracy the homicide was committed, bail will be refused, though petitioner was not present when the homicide was committed.—EX PARTE BONNER, Ala., 14 South. Rep. 648.

34. CRIMINAL LAW—Rape— Evidence.—In a prosecution under section 11 of the Criminal Code for rape upon the daughter of the accused 14 years of age, an instruction that "the amount of struggle and resistance necessary to be shown is not the same in all cases. A strong, able-bodied woman could protect herself, when a child could not; and a father could overcome and

subdue the will of his child, when a stranger could not,"—is not objectionable on the ground that it gives undue prominence to the age of the prosecutrix and her relation to the accused.—HAMMOND v. STATE, Neb., 57 N. W. Rep. 92.

35. CRIMINAL LAW—Suspending Sentence.—Laws 1893, ch. 279, permitting the criminal courts to suspend sentence during good behavior of the convict, where the maximum term prescribed does not exceed 10 years, and the convict has never before been convicted of a felony, does not conflict with Const. art. 4, § 5, vesting in the governor the exclusive power to grant reprieves and pardons. — PEOPLE v. COURT OF SESSIONS OF MONROE COUNTY, 36 N. E. Rep. 386.

36. CRIMINAL PRACTICE — Sodomy. — An indictment which charges, in the language of the statute, that defendant "did unlawfully and feloniously commit a certain unnatural and lascivious act" (St. 1887, ch. 436) with a person named, is sufficient, irrespective of section 2, which provides that such indictment need not allege a description of the act charged, but it shall be sufficient to charge it in the language of the statute, but the superior court, on motion of defendant shall order the district attorney to furnish him with specifications of the act charged.—COMMONWEALTH v. DILL, Mass., 36 N. E. Rep. 472.

37. DAMAGES—Mental Suffering. — Mental suffering is not an element of actual damages, in an action for injuries caused by negligence of defendant, which caused damage to plaintiff's property, but no physical injury to plaintiff. — GULF, C. & S. F. RY. CO. v. TROTT, Tex., 25 S. W. Rep. 419.

38. DEED—Construction — Description.—A deed conveying "the west portion" of such quarter "bounded on the south by C lake, and meandering along the water's edge eastward to a stake at the lake, low-water mark," conveyed merely to the water's edge, and the grantee therein acquired no title to any of the portion covered by water. — BROPHY v. RICHESON, Ind., 36 N. E. Rep. 424.

39. DEED—Escrow—Delivery.—A deed may be delivered to the attorney of the grantee, in escrow, the delivery being accompanied by a writing explaining the condition on which delivery to the grantee depends. ASHFORD v. PREWITT, Ala., 14 South. Rep. 663.

40. DEED—Reformation. — H conveyed land to V for life, remainder to V's children, or, if he left none, reversion to H or his heirs. After H's death the heirs executed a conveyance to V, reciting their relinquishment of all right in such land for a specified consideration: Held, that the remainder to V's children was unaffected by such agreement, and that complainants, claiming the land through mesne conveyances from V, could not maintain a bill to enjoin ejectment against them by H's heirs, and to reform the agreement, in the absence of any showing that V died leaving no children. —MOORE v. TATE, Ala., 14 South. Rep. 635.

41. DIVORCE—Separate Maintenance.—A wife, soon after being ejected from her home by her husband for adultery, sued him in the Probate Court for separate maintenance under Pub. St. ch. 147, § 33. He defended under the general issue, but did not introduce evidence of her adultery. A decree was rendered for the wife, reciting that for "justifiable cause" she was living apart from him; Held that, in a subsequent suit for divorce, the decree was not conclusive that she had not committed adultery, since that issue was not necessarily involved.—WATTS v. WATTS, Mass., 36 N. E. Rep. 479.

42. DIVORCE — Setting Aside Decree.—A wife may maintain a bill to have a decree of divorce in favor of her husband set aside, and to have alimony granted, where she was not notified of the proceedings for divorce, and was imprisoned, at the instigation of her husband, pending such proceedings, so that she had no opportunity to defend or to claim alimony.—GOLDEN v. GOLDEN, Ala., 14 South. Rep. 638.

43. EASEMENTS—Obstructions.—In an action to enjoin the obstruction of an alley granted by defendant to plaintiff's grantor, it appeared that the description in the deed of the alley was so indefinite that its identity could not be ascertained, but that after the grant it was definitely located by the parties, and passed to the possession of the grantee, who continued to use it for nine years: Held, that evidence of oral statements of the parties, made prior to the grant, indicating a purpose by the grantor, at some time, to acquire other land and and locate the alley over it was incompetent.—WHARTON v. HANNON, Ala., 14 South. Rep. 630.

44. EJECTMENT—Deed—Notice.—In a deed with covenants of warrant, the sentence, "Except as to back taxes, and so far as the acts of said grantor are concerned, this is to be a warranty deed," would not put a prudent person on inquiry whether the grantor had previously conveyed the same land.—JENNINGS v. DOCKHAM, Mich., 58 N. W. Rep. 66.

45. EJECTMENT—Tax Sale.—Where, in an action of ejectment, title has been adjudicated in the plaintiff, but the defendant in possession decreed to have a lien upon the land, and the land ordered sold to satisfy it, the purchaser at a sale under such decree cannot, as a subsequent action of ejectment against him, tack the prior possession of the lienors to his own possession subsequent to the sale, for the purpose of establishing a title, by adverse possession against another who claims under the same source of title as the plaintiff in the action where the sale was had.—CARSON v. DUNDAS, Neb., 58 N. W. Rep. 141.

46. EJECTMENT — Title to Support.—A judgment in partition between, and deed thereunder to, persons who never had title to the land, does not entitle parties claiming under such grantees to judgment in ejectment against parties in possession, in the absence of proof of possession by such grantees or plaintiffs prior to defendants' possession.—GREENLEAF v. BROOKLYN, F. & C. I. R. CO., N. Y., 36 N. E. Rep. 393.

47. ESTOPPEL—Fraudulent Representations.—W and R were partners. R had an unrecorded mortgage on W's interest, and sold his to L, representing that W's interest was unincumbered. W and L, for partnership purposes, borrowed money from C, giving him a mortgage on the partnership property, L representing in good faith that it was unincumbered: Held that, as R is estopped from setting up any claim prejudicial to L's right as a partner, the assets should not only be used to pay partnership debts, but also to pay any balance due L, before payment of R's mortgage.—RICKETTS v. CROOM, Ala., 14 South. Rep. 637.

48. EVIDENCE—Cured by Exclusion.—Error in admitting evidence, in a personal injury case, that the probable cost of medicines would be $500, is cured by remittitur of that amount.—GALVESTON, H. & S. A. RY. CO. v. DUELM, Tex., 25 S. W. Rep. 406.

49. EVIDENCE—Declarations.—On the issue whether, when he saw it, defendant accepted the clay model of a statute ordered, a letter written to defendant, some time after, by one of the manufacturing firm, stating that he had word from his partner that defendant was dissatisfied, asking him why he did not say so when he saw the model, and quoting a number of commendations of the artist and this model, is incompetent for any purpose.—THOMAS v. GAGE, N. Y., 36 N. E. Rep. 385.

50. FRAUDS, STATUTE OF—Agreement to Lease Land. —An oral agreement of an indorser of testator's notes to lease a house to executrix, the sole beneficiary of the will, if she would pay the notes and save the indorser, made before the proving of the will, and while the amount of assets were uncertain, though supposed to be less than the debts, is enforceable, where the executrix pays the notes, partly with her own means, and occupies the house under the agreement.—DUNCKEL v. DUNCKEL, N. Y., 36 N. E. Rep. 405.

51. FRAUDULENT CONVEYANCE—Preferring Creditor.—An insolvent may prefer a creditor by sale of goods in payment of a pre-existing debt, though they know it will prevent other creditors collecting their debts; the only conditions being that the debt be *bona fide*, that the goods be taken at a fair and adequate price, and that no benefit be reserved in behalf of the debtor.—BATES V. VANDIVER, Ala., 14 South. Rep. 631.

52. GARNISHMENT — Equitable Claim.—Where the vendee of land makes a part payment on the purchase, and fails to make the deferred payments as agreed, he has no claim against his vendor for the amount of his part payment, or for the value of improvements placed by him on the land, which can be the subject of a garnishment in favor of his judgment creditor.—REDONDO BEACH CO. V. BREWER, Cal., 35 Pac. Rep. 896.

53. HOMESTEAD—Rights of Wife.—A wife's interest in the homestead is such that she may protect it and may redeem from a mortgage having precedence of the homestead right. A foreclosure of such mortgage by action to which she is not a party will not affect her homestead interest.—SPALTI V. BLUMER, Minn., 58 N. W. Rep. 156.

54. HOMESTEAD EXEMPTIONS.—The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the homestead claimant's interest therein.—HOY V. ANDERSON, Neb., 58 N. W. Rep. 125.

55. INJUNCTION BOND—Parties.—On the breach of an injunction bond, of which the condition is to pay all damages "any person" may sustain by the injunction if it is dissolved, any one of those against whom the injunction was granted, who has been damaged thereby, may sue. — SMITH V. MUTUAL LOAN & TRUST CO., Ala., 14 South. Rep. 625.

56. INTEREST ON JUDGMENT FOR COSTS.—Under How. Ann. St. § 7672, directing interest on judgments to be collected on execution, and section 1597, allowing interest on claims against a deceased person's estate, a judgment against an estate for costs bears interest from its date, and not merely from the date when the costs were taxed.—HAYDEN V. HEFFERAN, Mich., 58 N. W. Rep. 59.

57. INTOXICATING LIQUORS — Evidence.—Where defendant's barkeeper testifies that he sold intoxicating liquor to a minor, and that it was beer, the jury are warranted in finding that the beer was intoxicating.—COMMONWEALTH V. GAVIN, Mass., 36 N. E. Rep. 484.

58. JUDGES—Compensation.—The act (P. L. 1889, p. 90), which provides that all the fees authorized to be paid into court for the services of the common pleas judges, in counties where there are law judges receiving salaries in lieu of fees, shall be divided between the lay judges, does not include fees for the services of a law judge, paid under a special act providing fees for his services only.—STATE V. O'NEILL, N. J., 28 Atl. Rep. 557.

59. JUDGMENT—Limitation of Actions.—A judgment becomes dormant and ceases to be a lien on the real estate of the judgment debtor in five years from the date thereof, unless an execution is sued out on such judgment within said period. In case an execution is issued and returned in such time, it will continue the lien of the judgment for five years from the date of such execution.—FLAGG V. FLAGG, Neb., 58 N. W. Rep. 109.

60. JUDICIAL SALES—Specific Performance.—A person, by becoming a purchaser of property sold at a judicial sale, becomes a party to the proceeding under which such sale is made and may be compelled by the court in which the proceeding is pending to complete his purchase.—MAUL V. HELLMAN, Neb., 58 N. W. Rep. 112.

61. LANDLORD AND TENANT—Lien on Crop.—A complaint for conversion of cotton on which "plaintiff had a lien for rent and advances," not demurred to for failure to set out the facts from which the lien resulted, is sufficient as one in case, and will sustain proof of the relation of landlord and tenant between plaintiff and the grower of the cotton, and of notice thereof to defendant.—KELLY V. EYSTER, Ala., 14 South. Rep. 657.

62. LANDLORD AND TENANT—Replevin.—In replevin for goods attached by defendant as plaintiffs' landlord for rent and supplies, where the evidence was conflicting as to whether defendant was plaintiffs' landlord, a charge authorizing a finding for defendant if plaintiffs understood that he was furnishing the supplies as their landlord, whether he was or was not their landlord, was erroneous.—JAMISON V. ACKER, Miss., 14 South. Rep. 691.

63. LIBEL — Privileged Communications—Report at Town Meeting.—A committee appointed by a town to investigate waterworks built for the town by certain contractors is protected from liability for statements in its report, made in good faith, without malice, with reasonable cause to believe them to be true, and which do not go beyond what is fairly required in the discharge of its duty.—HOWLAND V. FLOOD, Mass., 36 N. E. Rep. 482.

64. LIMITATION — Commencement of Actions.—Code Civ. Proc. § 399, relating to the commencement of actions and the suspension of the statute of limitations, provides that an attempt to commence an action shall be equivalent to its commencement when summons is delivered to the proper officer with intent that it shall actually be served, but that delivery of summons to the officer must be followed by service within a specified time: Held that, where defendant's death after delivery of summons to the officer rendered service impossible, such delivery saves the claim from the bar of the statute up to the date of defendant's death.—RILEY V. RILEY, N. Y., 36 N. E. Rep. 398.

65. MARRIED WOMAN—Bite of Vicious Dog.—A wife living with her husband on premises owned by her is not liable for injuries caused by the bite of a vicious dog kept on such premises, though Code, § 2345, provides that a married woman shall be alone liable for her torts.—STROUSE V. LEIPH, Ala., 13 South Rep. 667.

66. MASTER AND SERVANT— Assumpsit of Risk.—An employee working with and about two cylinders in contact with each other and revolving inwardly, and in plain view, cannot recover for injuries caused by her fingers being caught between such cylinder.—CONNELLY V. ELRIDGE, Mass., 36 N. E. Rep. 469.

67. MASTER AND SERVANT—Eight Hour Law—Extra Time.—Act March 6, 1889, declaring eight hours a legal day's work, but expressly permitting overwork for extra compensation, does not entitle one who agrees to do a certain kind of work at a specified price per day, knowing that more than eight hours each day will be required to do the work, and who at the end of each week, receives, without objection, payment for the previous week's work at the agreed price per day, to recover of his employer for the time worked in excess of eight hours per day.—GRISELL V. NOEL BROS. FLOUR, Ind., 36 N. E. Rep. 452.

68. MASTER AND SERVANT—Negligence.—Where gang planks for unloading freight of the same kind as the one which slipped from the car, causing plaintiff's injuries, had been used by defendant railroad company for 15 years without an accident, it cannot be said as a matter of law, that defendant was negligent in furnishing such an appliance.—LA PIERRE V. CHICAGO & G. T. RY. CO., Mich., 58 N. W. Rep. 60.

69. MASTER AND SERVANT—Negligence — Risk of Employment.—Where a latent defect in a drawbar caused an injury to a brakeman, the court properly refused to charge that the brakeman assumed the risk of employment, because his opportunities to observe the defect were equal to those of the railroad company.—PITTSBURGH, C., C. & ST. L. RY. CO. V. WOODWARD, Ind., 36 N. E. Rep. 442.

70. MEASURE OF DAMAGES.—The measure of damages for constructing a drain over private land is the difference between the previous fair market value of the

land and the value afterwards.—DRISCOLL v. CITY OF TAUNTON, Mass., 36 N. E. Rep. 495.

71. MECHANICS' LIENS—Affidavit.—Where an affidavit attached to a mechanic's lien purports to have been sworn to before a notary public, and shows upon its face that it was taken or made without the jurisdiction of the notary public, it is invalid, insufficient to perfect the lien, and renders it incompetent as evidence. —BYRD v. COCHRAN, Neb., 58 N. W. Rep. 127.

72. MECHANIC'S LIEN—Filing Claim — Time. — Under Rev. St. 1893, ch. 82, § 28, which declares that no creditor may enforce a lien, as against third parties, unless a claim, shall have been filed within four months after the last payment shall have become due, a lien may be enforced where the claim is filed within four months after the last payment fell due under the contract out of which the lien arises, although after it so fell due and before the claim was filed a note was taken for the amount due, which note had not matured when the claim was filed.—DAWSON v. BLACK, Ill., 36 N. E. Rep. 413.

73. MECHANICS' LIENS — Property Subject to.—A person who furnishes work and materials to dredge for a riparian owner in front of his water lot, and to construct docks in front of such lot, has a lien under Sanb. & B. Ann. St. §§ 3314, 3318, on such structures, and also on the interest of the riparian owner in the lots, and the rights appurtenant thereto, subject to the public right to use the water in which such structures are, for navigation and other lawful purposes.—WILLIAMS v. LANE, Wis., 58 N. W. Rep. 77.

74. MECHANICS' LIENS — Vendor and Purchaser. — Where the owner of land completes negotiations for the sale thereof, and the vendee takes possession with out the consent of the owner, and commences the erection of a building, but fails to make the payment of the purchase money, which, by the terms of the sale, was to be made upon the delivery of the conveyance, and the vendor refuses to make a conveyance or complete the contract without such payment, no agreement in writing having been executed, the vendor is not charged with liens for labor and material used in constructing the building. — BURLINGIM v. WARNER, Neb., 58 N. W. Rep. 132.

75. MORTGAGES—Assignment. — The assignment of a bond and mortgage without the assignment of the note secured confers no rights on the assignee.—JOHNSON v. CLARKE, N. J., 28 Atl. Rep. 558.

76. MORTGAGES — Foreclosure — Pleadings. — Where several parties purchased real property, the title being taken in the name of one of them as trustee for all the purchasers, and the deed of conveyance to him recited, as part of the consideration for the conveyance, that the grantee named as trustee agreed and assumed to pay a mortgage in existence upon the premises conveyed: Held that, upon an averment of the above facts in the petition, there should not be inferred, of necessity, the conclusion that the *cestuis que trustent* for whom the trustee was acting were individually liable for a deficiency which might remain unsatisfied upon the foreclosure sale of the mortgaged premises.—REYNOLDS v. DEITZ, Neb., 58 N. W. Rep. 89.

77. MORTGAGE OF HOMESTEAD—Acknowledgment.—A mortgage of a homestead was void, where the certificate of the wife's acknowledgment stated that it was made in H county, before a justice of the peace of H county, whereas such justice took the acknowledgment and made the certificate at the homestead, in G county. —EDINBURGH AMERICAN LAND MORTG. CO. v. PEOPLES, Ala., 14 South. Rep. 656.

78. MUNICIPAL CORPORATION — Agents — Contract.—A city's common council, being empowered by Act March 3, 1883, to light its streets with electric lights, and to operate its own plant, may contract for the services of a lineman at a monthly salary for three years.—ROCKEBRANDT v. CITY OF MADISON, Ind., 36 N. E. Rep. 444.

79. MUNICIPAL CORPORATIONS—Defective Sewer.—In an action against a city to recover damages caused by a sewer, owing to insufficient size, setting back the water into plaintiff's cellar, the following charge approved: "Where a public work, for instance a sewer, as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudent measures, the corporation is liable for such damages as may occur in consequence of the original cause, after notice and an omission to use ordinary care to remedy the evil."—TATE v. CITY OF ST. PAUL, Minn., 58 N. W. Rep. 158.

80. MUNICIPAL CORPORATION—Defective Sidewalks.—A sidewalk is defective if, in consequence of its construction, some special cause for the formation of ice exists rendering the sidewalk unsafe, though the ice is smooth and not accumulated in ridges; and the jury is warrantied in finding that a gutter about 14 inches wide and 1¼ inches deep, extending across the sidewalk, is a defect.—HUGHES v. CITY OF LAWRENCE, Mass., 36 N. E. Rep. 485.

81. MUNICIPAL CORPORATIONS — Defective Streets.—The duty ordinarily resting upon a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is remitted during the time occupied in making repairs or improvements.—CITY OF LINCOLN v. CALVERT, Neb., 58 N. W. Rep. 115.

82. MUNICIPAL CORPORATIONS —Negligence — Defective Streets.—In an action again t a city for personal injuries from a defective street, defendant's evidence tended to prove that the trench in the street was filled in a workmanlike manner, so that the streets over it was solid when the work was finished in the afternoon of the day before the accident: Held, that the jury might find that the condition of the street the next morning was such as to show that the work was badly done, and that observation of the work while being done, or of the place thereafter, would have shown the defect to a skilled eye.—BINGHAM v. CITY OF BOSTON, Mass., 36 N. E. Rep. 473.

83. MUNICIPAL CORPORATION — Streets — Dangerous Obstruction.—One who knows of a ditch in a street, and that at night its exact location cannot be fixed, uses the street at her peril.—CITY OF BLOOMINGTON v. ROGERS, Ind., 36 N. E. Rep. 439.

84. MUTUAL BENEFIT INSURANCE—Certificate.—In an action on a benefit certificate, providing for the payment to the beneficiaries of the holder, upon his death, of 80 per cent. of such sum as an assessment levied on the members of the association would amount to, not exceeding $4,000, the complaint alleged that the holder was dead, that plaintiffs were his beneficiaries, that defendant refused to pay or to levy an assessment, and demanded a judgment for $4,000, or a judgment compelling defendant to levy and collect an assessment: Held, that such complaint was bad for ambiguity, and as asking for either a money judgment or equitable relief.—JOHNS v. NORTHWESTERN MUT. RELIEF ASS'N., Wis., 58 N. W. Rep. 76.

85. MUTUAL BENEFIT SOCIETY—Powers of Subordinate Lodge.—A subordinate lodge of an order, the aim of which is "to unite fraternally all acceptable persons," may appropriate, for the support of a lodge to be organized under the same jurisdiction, part of a fund raised among its members by contribution, out of which its general expenses and sick benefits are payable, if such appropriation is not prohibited by its by-laws or the general laws of the order.—LADY LINCOLN LODGE v. FAIST, N. J., 28 Atl. Rep. 555.

86. NEGLIGENCE.—An express messenger, who, by a contract between the express company and railroad, also handles the latter's baggage on the train, and is required by a rule of the road to consider himself its servant in matters relating to the movement and government of the train, and to obey the conductor, may recover from the railroad for injuries caused by the

negligence of a brakeman.—UNION PAC. RY. CO. v. KELLEY, Colo., 35 Pac. Rep. 923.

87. NEGLIGENCE—Dangerous Premises—Trespasser.—A constable having a civil writ to serve, and entering, by a doorless opening, a tenement house, wherein he wrongly supposes that the person to be served resides or is, is a mere trespasser, and cannot recover for injuries received by falling down a dark stairway.—BLATT v. MCBARRON, Mass., 36 N. E. Rep. 468.

88. NEGLIGENCE — Imputed Negligence.—The negligence of the owner and driver of a private conveyance is imputable to one who is voluntarily riding with him, and the latter cannot recover damages against a city for injuries caused by its negligence, where the negligence of such driver contributed thereto.—WHITTAKER v. CITY OF HELENA, Mont., 35 Pac. Rep. 904.

89. NEGLIGENCE — Snow Falling from Roof.—A lot owner has no right to erect a building, of no unusual construction, so near the street that snow or ice will fall from it, in the ordinary course of things, so as to endanger travelers in passing; and if he does so, would be liable without further proof of negligence.—SHEPARD v. CREAMER, Mass., 36 N. E. Rep. 475.

90. NEGOTIABLE INSTRUMENTS — Checks.—Neither a check nor bill of exchange operates as an assignment *pro tanto* of the drawer's funds in the hands of the drawee.—EXCHANGE BANK OF WHEELING v. SUTTON BANK, Md., 28 Atl. Rep. 563.

91. NEGOTIABLE INSTRUMENT — Discount by Bank—Bona Fide Purchaser.—The president of plaintiff bank, without consideration, obtained defendants' note as a personal loan, and, without disclosing the want of consideration, procured its discount by plaintiff's cashier: Held, that, though the cashier was without authority to discount paper, his agency in discounting the note not having been disavowed by plaintiff, it could recover on the note having been disavowed by plaintiff, it could recover on the note, as the president's knowledge of its infirmity could not be imputed to it.—FIRST NAT. BANK OF GRAFTON v. BABBIDGE, Mass., 36 N. E. Rep. 462.

92. NEW TRIAL—Offer to Bribe Juror.—The fact that a juror was offered a bribe by a person not an agent of the prevailing party, it appearing from the juror's affidavit setting out the fact that he was not influenced thereby, is not ground for a new trial.—CLAY v. CITY COUNCIL OF MONTGOMERY, Ala., 14 South. Rep. 646.

93. PARTNERSHIP.—Where a firm has become a party to an action by a joinder of all the partners, the dismissal of the action as to each or any of the partners deprives the court of jurisdiction of the firm.—FRANK v. TATUM, Tex., 25 S. W. Rep. 409.

94. PARTNERSHIP—Accounting.—When after a careful taking of stock, and a deliberate accounting, aided by an expert, partners have made a settlement of their affairs, each being a capable business man and having no confidence in the other, the court will require strong proof to surcharge and falsify for mistake in such important matters as the amount of capital put in by one partner, and the calculation of the price on one line of the stock in trade, taken by him in the settlement.—SCHEUER v. BERRINGER, Ala., 14 South. Rep. 640.

95. PARTNERSHIP AGREEMENT—Rights of Partners.—A partnership agreement provided for "procuring, fencing, stocking, and operating a ranch,"—each partner to share equally all expenses, profits, and losses; that questions as to firm stock should require consent of all the partners; that in stocking the ranch no partner should, except by consent, put thereon exceeding a third of its capacity: Held, that each member could use the ranch for pasturing his individual cattle free of charge for such use, but otherwise at his own expense.—CARHART v. BROWN, Tex., 25 S. W. Rep. 415.

96. PLEADING—Amendment.—Pleading the instrument sued on in *haec verba* in the declaration is a sufficient compliance with the statute requiring a copy of such instrument to be filed with the declaration.—PHENIX INS. CO. v. STOCKS, Ill., 36 N. E. Rep. 408.

97. PLEADING—Amendment.—Where a plaintiff to an action is designated in the pleading and process by the initials of his Christian name, it is not error for the court to allow him to amend by inserting his full Christian name.—REAL v. HONEY, Neb., 58 N. W. Rep. 136.

98. QUO WARRANTO—Annulment of Charter.—In *quo warranto* to annul the charter of a water company of a city because it had willfully failed for three years to furnish such city with a sufficient supply of water, an answer by respondent that it had enlarged its works and increased its water supply up to a certain date, and was then negotiating for other wells which would supply all necessary demands, and that it ceased such negotiations because the city had declared its intention to exercise its option to purchase such waterworks, is insufficient to constitute a defense.—STATE v. CAPITAL CITY WATER CO., Ala., 14 South. Rep. 652.

99. RAILROADS—Killing Stock.—When the engineer and fireman have testified that the cattle did not come within the radius of the headlight till too close to allow a stoppage of the engine, and were then walking obliquely towards the track, on level ground, but many witnesses testify that they were killed in a cut 500 yards long, that the carcasses were found three-fourths of the way through the cut, and that they had apparently run some 200 yards along and by the track, and the wounds inflicted were in the rear, a finding that the railroad has not overcome the presumption of negligence (Code 1886, §§ 1144-1147), is justified.—MEMPHIS & C. R. CO. v. DAVIS, Ala., 14 South. Rep. 643.

100. RAILROADS—Persons on Track—License.—Since Rev. St. § 1811, makes it unlawful for any one unconnected with a railroad to walk along its track unless laid in a public street, no mere user of a track by the public will raise an implied license to walk over a trestle, 120 feet long, unplanked, and so narrow as to leave no room to avoid a passing train, which is on a main track, and is crossed daily by a dozen regular trains besides specials.—ANDERSON v. CHICAGO, ST. P., M. & O. RY. CO., Wis., 58 N. W. Rep. 79.

101. RAILROAD COMPANY — Electric Street Cars.—Plaintiff, without noticing whether any car was approaching, turned his team in the middle of a block to cross a street railroad track, and was struck by an electric car traveling in the direction he had been going. He was familiar with travel on the railroad, and, when at the preceding street crossing, saw, a car 900 feet in front, on a switch, waiting for a car coming in the same direction he was. He testified that at point he looked back, and saw no car, but a car could be seen for three-quarters of a mile, and the one which struck him, had it not been in sight, would not have reached the point of collision till three minutes after he had crossed. Held, that he was guilty of negligence.—DAVIDSON v. DENVER TRAMWAY CO., Colo., 35 Pac. Rep. 920.

102. RAILROAD COMPANIES—Fencing Track.—The fact that a railroad passes through an addition to a city, which is plotted into lots, streets and alleys, does not, of itself, absolve the railroad company from fencing its track.—TOLEDO, ST. L. & K. C. R. CO. v. CUPP, Ind., 36 N. E. Rep. 445.

103. RAILROAD COMPANIES—Injury to Railroad Employee.—A brakeman thrown from a car while releasing a brake cannot recover for the resulting injuries in the absence of evidence of any defect in the break that would cause it to "stick," or of proof of any fact accompanying its release that would tend to throw him off.—LOUISVILLE, & N. R. CO. v. BINION, Ala., 14 South. Rep. 619.

104. RAILROAD COMPANIES — Liability for Fires.—Where a locomotive alleged to have communicated a fire was shown to have been provided with a spark arrester in good repair and properly operated by a skillful engineer, a recovery for the resulting damage was not warranted, in the absence of an affirmative showing of negligence on defendant's part.—NEW YORK, C. & ST. L. R. CO. v. BOLTZ, Ind., 36 N. E. Rep. 414.

105. RAILROAD COMPANIES — Negligence — Fires.—A complaint which alleged that K's premises were fired by sparks from a passing engine, that defendant negligently omitted to equip the engine with a proper spark arrester, and that fire spread from K's premises to plaintiff's premises without his negligence, was demurrable for want of an allegation that the sparks were negligently permitted to escape to K's premises.—LAKE ERIE & W. R. CO. v. MILLER, Ind., 36 N. E. Rep. 428.

106. RAILROAD COMPANY — Personal Injuries—Negligence.—In an action to recover damages for injuries charged to have been inflicted by a street railway company, an instruction designed to embrace all elements essential to a recovery sufficiently met requirements as to the absence of contributory negligence by requiring the use of 'ordinary care and diligence" by plaintiff; the term "ordinary care and diligence," being subsequently by instructions, fully defined.—OMAHA ST. RY. CO. v. CLAIR, Neb., 58 N. W. Rep. 98.

107. SALES—Contract—Damages.—In an action on a note, defendant cannot claim set off for damage caused by plaintiff's failure to deliver certain goods as agreed, when defendant fails to show the value of the goods at the time and place for delivery, as this is necessary to ascertain the amount of such damage.—HARWELL v. LEHMAN, Ala., 14 South. Rep. 622.

108. SALE—Warranty—Damages.—One who has bought from an experienced maker the best appliance made by him for the use intended, which appliance should have lasted for years, but broke, at a hidden flaw, after a proper usage of two months, cannot recover from the maker, as part of his damages for breach of warranty, money he has paid without suit, to his servant, for bodily injuries caused by the breakage.—ROUGHAN v. BOSTON & LOCKPORT BLOCK CO., Mass., 36 N. E. Rep. 461.

109. SPECIFIC PERFORMANCE—Resulting Trust.—A resulting trust does not arise where a person, after buying land, tells another that he has bought it for him, and that he can have it for the amount paid and an additional sum, though the proposition is accepted and the money paid.—MILNER v. STANFORD, Ala., 14 South. Rep. 644.

110. STATUTES—Amendment.—The governor's call of a special session having asked for legislation to reduce by one-half the rate of penalties and interest on delinquent taxes, a bill introduced in the house for that purpose, and entitled "To amend section 124 of chapter 94," was amended in the senate so as to attain the same object by amending that and other sections of the chapter: Held, that there was no change in the bill's original purpose (Const. art. 5, § 17), and the title could be amended to cover such purpose as extended.—IN RE AMENDMENTS OF LEGISLATIVE BILLS, Colo., 35 Pac. Rep. 917.

111. STATUTE — Penal Statute — Indefiniteness.—Act Feb. 12, 1887, § 3, providing that one who shall take away with intent to steal, or hold for a reward, a dog registered under that act, "shall be punished on conviction as in other cases of larceny," is void for uncertainty, since it does not make dogs property, or give them any value, nor does it state whether the punishment of grand or petit larceny shall be imposed.—JOHNSTON v. STATE, Ala., 14 South. Rep. 629.

112. TAX SALE—Validity.—Where, in the tax record, the items of taxes, interest, collection fees, and amounts sold for are in figures, without dollar marks, or any signs to indicate what the figures mean, except that a line appears at the left of the last two figures, the tax sale is void.—MILLARD v. TRUAX, Mich., 58 N. W. Rep. 72.

113. TAXATION—Tax Deed.—An equitable action will lie to set aside a tax deed as a cloud on plaintiff's title, where the proceedings are in fact void, since Laws 1873, ch. 620, § 9, makes such deed conclusive evidence of the regularity of the sale, and presumptive evidence of the regularity of all prior proceedings.—SANDERS v. DOWNS, N. Y., 36 N. E. Rep. 391.

114. TELEGRAPH COMPANIES — Proximate Cause.—A mistake in the transmission of a telegram requesting the services of a veterinary surgeon cannot be deemed the proximate cause of the death of the horse belonging to the sender of the telegram, where the evidence is merely conjectural as to whether the life of the horse might have been saved had a veterinary come at once, pursuant to a correct transmission.—DUNCAN v. WESTERN UNION TEL. CO., Wis., 58 N. W. Rep. 75.

115. TRESPASS TO TRY TITLE—Identity of Grantor.—Where, in trespass to try title, both parties claimed title from E, and an affidavit was made attacking the deed to plaintiff as a forgery, and defendant offered evidence that the person who signed the deed to plaintiff was not the E who had title, the burden was on plaintiff to show the identity.—STEINER v. JESTER, Tex., 25 S. W. Rep. 411.

116. TRIAL—Necessity of Instructions.—Civ. Code, § 187, which provides that the court "shall" give such instructions as may be necessary, does not require the giving of instructions in an action, tried in the absence of defendant, to recover a balance due on an account.—HAMILL v. HALL, Colo., 35 Pac. Rep. 927.

117. TRIAL—Sending Instruction to Jury Room.—Instructions must be given in open court in the presence of the accused, and of his counsel if practicable; and an instruction sent to the jury room in answer to a written question by an individual juror is erroneous.—JOHNSON v. STATE, Ala., 14 South. Rep. 627.

118. TRUSTS—Enforcement—Jurisdiction.—A contract between defendant's testator and complainant's intestate provided that the latter should plat and sell designated lands, all moneys to be furnished by testator; he to be reimbursed by moneys received from sales of the first lots, after which the parties should divide the proceeds equally: Held, that a breach of the agreement by testator would not give rise to a claim against his estate of which the probate court had jurisdiction, but that complainant's remedy was in equity for an accounting of the trust.—FOWLE v. BARNES, Mich., 58 N. W. Rep. 63.

119. VENDOR'S LIEN — Enforcement.—A vendor who retains title and has the right to possession, but binds himself to convey on payment of price, can maintain a suit to enforce his lien against the assignee for benefit of creditors of the purchaser, and this right cannot be affected by a decree obtained by the assignee in a proceeding to which the vendor was not a party.—JANNEY v. HABBELER, Ala., 14 South. Rep. 624.

120. VENDOR'S LIEN—Statute of Frauds.—The statute of frauds is not ground for demurrer to a bill to enforce a vendor's lien unless the bill affirmatively shows that the contract of sale was not in writing.—HARPER v. CAMPBELL, Ala., 14 South. Rep. 650.

121. WILL— Construction—Right of Legatee.—Under a will directing the trustee to pay the income to testator's wife, providing that, if she should wish to use for her own purposes all or any of the property, she should have such power, and providing that she should, during her life, be entitled to possession of all his estate, without security, where the income is insufficient to meet her necessities she is entitled to have the deficiency made up out of the principal.—IN RE MARTIN'S ESTATE, Penn., 28 Atl. Rep. 575.

122. WILL—Testamentary Capacity.—One who, at the time of executing a will, has mind and memory sufficient to remember the property he is about to bequeath the objects of his bounty, and the disposition he wishes to make of it, and to know and understand the business he is engaged in, and the consequences of the business to be performed, has a sound and disposing mind and memory.—BURNEY v. FORREY, Ala., 14 South. Rep. 685.

123. WITNESS — Credibility — Instructions.—Where a witness is impeached by proof of contradictory statements, an instruction that such proof should "weigh heavily" against the witness invades the province of the jury.—PAUL v. STATE, Ala., 14 South. Rep. 634.